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No. 357

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

GENERAL TELEPHONE COMPANY OF CALIFORNIA, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, NATIONAL CABLE TELEVISION ASSOCIATION, INC., ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions	2
Statement	3
Reasons for Granting the Writ	8
I. The Commission's Decision Ousts the States of Regulatory Authority Over the Construction and Operation of Intrastate Common Carrier Lines Used To Provide Local Distribution Service to CATV Operators	8
II. The Decision Below Gives CATV Operators Who Own Distribution Facilities an Undue Competitive Advantage Over Those Operators Who Rely Upon Common Carriers for Distribution Service	11
III. The Decision Below Is Not Consistent With Applicable Decisions of This Court	13
Conclusion	17
Attachment A	18
Attachment B	20

TABLE OF CITATIONS

CASES:

AT&T, 9 F.C.C. 2d 30 (1967)	15
Better T.V., Inc. v. *New York Telephone Co.*, 17 F.C.C. 2d 367 (1969)	9, 12
Carter Mountain Trans. Corp. v. *FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963)	15
Federal Radio Comm'n v. *Nelson Bros. Bond & Mtge. Co.*, 289 U.S. 266 (1933)	7

Page

Fortnightly Corp. v. *United Artists Television, Inc.*, 392 U.S. 390 (1968) 15
ITT World Communications, Inc., 13 F.C.C. 2d 924 (1968) 10
New England Telephone & Telegraph Co., 17 F.C.C. 2d 33 (1969) 10
New Orleans Term. Co. v. *Spencer*, 366 F.2d 160 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967) 9
Pennsylvania R.R. v. *Public Utilities Commission*, 298 U.S. 170 (1936) 13
Pennsylvania R.R. v. *United States*, 242 F. Supp. 890 (E.D. Pa. 1965), *aff'd*, 382 U.S. 372 (1966) 13
Scenic Hudson Pres. Conf. v. *FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) 9
TV Pix, Inc. v. *Taylor*, — F. Supp. —, Civ. No. 1814 (D. Nev. 1968) 11
United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 4, 11
Yonkers v. *United States*, 320 U.S. 685 (1944) 14

STATUTES:

Communications Act of 1934 (47 U.S.C. § 151)

Sec. 2(b)(1) 2, 5, 6, 13
2(b)(2) 2, 5, 7, 8, 16
3(u) 5
201-205 2
214 ..... 3, 5, 6, 8, 9, 10, 11, 12
214(a) 4, 5, 12, 16
214(a)(1) 5, 7, 16
214(a)(2) 5, 7, 16
312(b) 6

Interstate Commerce Act (49 U.S.C. § 1) 14
28 U.S.C. § 1254(1) 2

LEGISLATIVE MATERIALS:

Sen. Rep. No. 781, Committee on Interstate Commerce, 73d Cong., 2d Sess., p. 2 (1934) 14
78 Cong. Rec. 8823 (1934) 14

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OPINIONS BELOW

The opinion of the Federal Communications Commission (R. 2853) is officially reported at 13 F.C.C. 2d 448 (1968), and is reproduced in the separate appendix to this petition. (A30). The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 3067) is not yet officially reported, but is reprinted in the separate appendix to this petition. (A1).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on April 30, 1969. (R. 3095; A27). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the statutory plan of the Communications Act of 1934, as amended, for allocation between state and federal agencies of regulatory authority over communications common carriers is violated by an order of the Federal Communications Commission that requires a common carrier to obtain Commission approval prior to the construction or operation of a common carrier line that (1) will lie wholly within one state, (2) will be less than ten miles long and not extend beyond the limits of a single local community, and (3) will be used to provide a local distribution service to a CATV operator?

STATUTORY PROVISIONS

Section 2(b) of the Communications Act of 1934, as amended (47 U.S.C. § 152), provides in pertinent part:

> Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . except that sections 201-205 of this title shall, ex-

cept as otherwise provided therein, apply to carriers described in clauses (2)-(4) of this subsection.

Section 214 of the Communications Act of 1934, as amended (47 U.S.C. § 214), provides in pertinent part:

> (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length .... As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels ....

STATEMENT

The petitioners are thirty-five telephone companies ("the carriers"), six of which are affiliates of the General Telephone System, ten of which are affiliates of the United Telephone System, and nineteen of which are affiliates of the Bell System.[1] They seek review of a decision of the United States Court of Appeals

[1] The petitioners are listed in Attachment A to this petition.

for the District of Columbia Circuit affirming a decision and order of the Federal Communications Commission which held that Section 214(a) of the Communications Act requires the carriers to obtain the Commission's approval prior to their construction or operation of intrastate common carrier lines used to provide a local distribution service to CATV operators. This case involves the Commission's jurisdiction over common carriers, and unlike *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), does not concern its jurisdiction over CATV operators (who have been held by both the Commission and this Court not to be common carriers, *id.* at 169 n. 29). Thus, this case does not involve the Commission's jurisdiction over distribution lines owned by those CATV operators who do not utilize the services of common carriers. The Commission has never required such CATV operators to obtain approval for the construction of their lines. (R. 2854-55).

The common carrier service involved in this case is used by other CATV operators—those who do not own distribution lines—for the local distribution both of broadcast signals which they receive and of programs, time signals and the like which they originate locally. The common carrier facilities used for this service are very similar to, and in some instances are identical with, other facilities (long used by the carriers to provide similar services) for which FCC approval under Section 214(a) has never been required.[2] (R. 522-26; Tr. 411, 433).

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[2] For example, the FCC has never required certificates of public convenience and necessity for the intrastate and local lines used in the transmission of visual matter between a central source and multi-distribution points (such as between a bank office and its branches) or in the connection of program sources with theaters for closed circuit television viewing.

The lines by which the carriers provide services to CATV operators are located wholly within single States (in each instance but one) and are not connected to any other common carrier lines. (R. 527, 534, 905-34, 974). In all but one of the communities served the local distribution common carrier service is provided entirely within a ten-mile radius from the CATV operator's antenna. (R. 545-51, 894-934, 939).

On these facts, the carriers argued before both the Commission and the court below that Congress by three distinct statutory provisions left regulation of their lines to the States: Section 2(b)(1), which provides that the FCC shall have no jurisdiction over "facilities" used by "any carrier" for "intrastate communication service by wire or radio;" Section 214(a)(1), which provides that a line within a single State and not part of an interstate line is not subject to the certification requirements of Section 214(a); and Section 214(a)(2), which provides that "local, branch, or terminal lines" less than ten miles long are similarly not subject to Section 214(a). Additionally, those General and United Systems carriers which had never been held to be subject to Section 214 because they came within the definition of "connecting carriers" under Sections 2(b)(2) and 3(u) argued that the construction and operation of the lines here at issue did not make them subject to the FCC's Section 214 jurisdiction.

In support of their arguments with respect to these provisions, the carriers contended that these limitations upon the Commission's jurisdiction were designed to allocate federal and state regulatory authority over common carriers under Title II of the Act and were in no way affected by the Commission's broad

power over broadcasters, radio users and CATV operators under Title III of the Act.

In its decision and order the Commission rejected these arguments, and held that it had jurisdiction to require certificates of public convenience and necessity under Section 214 prior to the construction, operation or acquisition of common carrier lines used to provide local distribution service to CATV operators.[3]

The Court of Appeals affirmed the Commission on all points. In ruling upon the issue whether the common carrier service here was "intrastate communications service" under Section 2(b)(1), the court stated:

> "The Commission has construed its own statutory grant after much study and indeed not without periods of doubt and reservation as embracing all links, including strictly intrastate links, as being part of the interstate transmission. Its interpretation of its grant and its application are entitled, of course, to great deference. The petitioners have, by choice, inserted themselves as links in this indivisible stream and have become

[3] In its order the Commission also held that since the common carrier facilities here at issue had been constructed without Seciton 214 certificates, the cease and desist provision of the Act, Section 312(b), was applicable. It ordered the carriers to cease and desist from (a) the further construction of any facilities for CATV local distribution service until appropriate certificates had been obtained and (b) the operation of any facilities that were completed on or before the release date of the Commission's decision subject, however, to certain conditions that if met permitted continued operation. Subsequently, the Commission stayed its cease and desist orders pending judicial review, except insofar as they related to new construction or to the operation of systems that were not activated on or before the Commission's decision. (R. 3056). That stay order remains in effect by virtue of the order of the Court of Appeals which stayed its mandate pending this application for certiorari.

> an integral part of interstate broadcast transmission. They cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission. *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mtge. Co.*, 289 U.S. 266 (1933)." (A19-20).

Thus, the court, relying upon the Commission's "pervasive jurisdiction" over broadcasting, appears to have accepted the Commission's rationale that the interstate character of broadcast signals makes inapplicable specific statutory limitations upon the Commission's jurisdiction over intrastate common carrier lines.[4]

On the same basic rationale, the court agreed with the Commission that the common carrier lines were not exempted by Section 214(a)(1), holding that they were parts of interstate lines, even though they lay wholly within one state and were not connected to any other common carrier lines, since they carried broadcast signals (A22); it affirmed the Commission's holding that the carriers' lines, although they are situated solely within local communities and provide local distribution service, were not "local, branch, or terminal lines" within Section 214(a)(2), since it was convinced that the "central purpose" of this exemption would not be served by applying it to the provision of "TV service via CATV to an area that has theretofore been without broadcast distribution facilities" (A23-24); and it dispatched in a footnote

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[4] Both by its citation of 12 cases involving the FCC's Title III power with respect to the regulation of broadcasting and other forms of radio transmission and by references to the FCC's "pervasive jurisdiction" over broadcasting the court indicated that it believed this case was controlled by the fact that broadcast signals are carried by the common carrier service here at issue.

the contention of the connecting carriers that Section 2(b)(2) in any event precluded the Commission's assertion of Section 214 jurisdiction, holding that "the exclusion embodied in Section 2(b)(2) was meant to protect State jurisdiction over local telephone facilities which could place interstate calls through their connection with major toll lines" (A21, n. 19).

REASONS FOR GRANTING THE WRIT

I. The Commission's Decision Ousts the States of Regulatory Authority Over the Construction and Operation of Intrastate Common Carrier Lines Used To Provide Local Distribution Service to CATV Operators

This case involves the first instance since the passage of the Communications Act of 1934 in which the Commission has ousted the States from regulatory authority over the construction and operation of common carrier lines that are located within single States, are local in character and less than ten miles long, and are used to provide a local distribution common carrier service.

The immediate consequence of the decision below is the preemption of state regulation of common-carrier construction and operation of lines located solely within single States. Thirty-two States have statutes that give state regulatory commissions much the same jurisdiction over intrastate common carrier lines that Section 214 of the Communications Act gives the FCC with respect to interstate lines.[5] Moreover, other States regulate the construction of intrastate common carrier lines through municipal governments or through their rate regulation powers. The decision below nullifies each of these state enactments and regulatory measures insofar as they apply to intrastate common carrier lines used for common carrier service to CATV operators.

[5] Attachment B is a compilation of these state statutes.

This impact upon the common carrier regulatory scheme of most of the fifty States, standing alone, justifies this Court's review of the decision below.

The court's decision also endangers many other aspects of state regulation of common carriers, as well as of CATV operators who take service from common carriers. For example, a state court decision that a telephone company possesses authorization to provide the service here at issue would be nullified by an FCC order denying that carrier a certificate under Section 214. Alternatively, the grant of a Section 214 certificate could nullify conditions locally imposed upon a common carrier—*e.g.*, limitations on cable placement, zoning controls, etc. *Cf. New Orleans Term. Co.* v. *Spencer,* 366 F.2d 160, 164 (5th Cir. 1966), *cert. denied,* 386 U.S. 942 (1967); *Scenic Hudson Pres. Conf.* v. *FPC,* 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966).

State or local policy to grant competitive franchises to CATV operators could also be frustrated by the FCC jurisdiction at issue here. Thus, the Commission could deny a certificate to a telephone company that proposes to provide common carrier service to one of two competitive CATV operators, thereby stifling competition by the CATV operator who uses common carrier service. Indeed, the Commission has just recently held that in applying Section 214 it will consider the existence of CATV-operator-owned, unregulated facilities and might deny a certificate to a common carrier who proposes service to a competitive operator, merely because of the existing CATV-owned facilities. *Better T.V., Inc.* v. *New York Telephone Co.,* 17 F.C.C. 2d 367 (1969).

The Commission could, of course, as a matter of grace or comity, avoid undermining the policies of state and local regulatory bodies in Section 214 proceedings by deferring to the decisions of those bodies. Such deference would, however, simply confirm both that the issues posed by Section 214 applications with respect to local lines are local in character and that the application of Section 214 to those lines in no way serves the federal policies underlying that section. *See, New England Telephone & Telegraph Co.,* 17 F.C.C. 2d 33 (1969). *Compare, ITT World Communications, Inc.,* 13 F.C.C. 2d 924 (1968).

The court's decision, while relating directly to the construction and operation of common carrier lines, also necessarily extends the Commission's jurisdiction to rates and to other aspects of common carrier service, again at the expense of state and local regulatory authority. Prior to the Commission's assertion of jurisdiction, this state and local jurisdiction had been exercised in every State in which this service is offered.[6] The court by sustaining the Commission's holding that the service rendered by the carriers is not an intrastate service ousted these States of the jurisdiction they had previously exercised over this service.

The Commission's assertion of jurisdiction over the rates for the common carrier service here at issue cannot be justified by any contention that such jurisdiction is ancillary to its effective control of CATV operators' rates, for while the FCC has jurisdiction over the operation—*i.e.,* the retransmission of broad-

[6] For example, the Bell System Companies had filed tariffs in 44 States covering CATV local distribution service; 20 of these States had instituted proceedings concerning these tariffs and 10 had held formal hearings. (R. 528; Tr. 483-90, 529-30, 564, 595-96).

cast signals—of all CATV systems, *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), it does not have jurisdiction to regulate rates charged by CATV operators.[7] *See, TV Pix, Inc.* v. *Taylor*, — F.Supp. —, Civ. No. 1814 (D.Nev. 1968).

II. The Decision Below Gives CATV Operators Who Own Distribution Facilities an Undue Competitive Advantage Over Those Operators Who Rely Upon Common Carriers for Distribution Service

The advent of competition by CATV operators who rely on common carriers for local distribution service is a relatively new development in the CATV industry. The integrated CATV operators—those who own their own cable facilities—have predominated since the inception of the industry.

As noted above, the Commission's decision does not apply to integrated CATV operators and such an operator may therefore construct and operate his distribution facilities without obtaining any prior approval from the Commission. On the other hand, the CATV operator who for lack of sufficient capital to construct his own distribution facilities or for other compelling reasons wishes to use common carrier service for the local distribution of his signals must await the outcome of a Section 214 proceeding initiated by

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[7] Indeed, in the United States-FCC joint brief in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), it was expressly represented to this Court that:

> "[The] regulation of the carriage of television signals by CATV systems . . . is the only aspect of CATV operations over which Commission authority has been asserted. No attempt has been made to franchise or otherwise regulate entry into the CATV business, nor to fix CATV rates or limit the number of systems which can operate in a particular area." Brief p. 42.

the carrier before he may begin operations. If the carrier's application is denied, the CATV operator who would have been the customer for the service will as a practical matter be barred from the market.

An integrated CATV operator by filing a protest to a Section 214 application for common carrier service to a competitive CATV operator can therefore prevent that competition or at least delay it for months or even years while he preempts the market by extending his own system. *See, Better T.V., Inc.* v. *New York Telephone Co., supra.* Thus, even if Section 214 authority is eventually granted, the CATV operator relying upon common carrier service may find it too late to compete with the operator whose construction of facilities was unregulated. The potential for tying up competitors in the administrative process is revealed by the fact that in the 13 months that have expired since the Commission's decision in this case of the many Section 214 applications that have been opposed only one has been granted. The decision below thus gives the Commission authority to regulate in an indirect and discriminatory manner entry and competition in the CATV industry—matters heretofore conceded to be of local concern.[8] Both because of its effect on federal-state relations and because of its impact on the free market the decision below should be reviewed by this Court.

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[8] See p. 11 n.7, *supra.*

III. The Decision Below Is Not Consistent With Applicable Decisions of This Court

The court below rejected the carriers' argument that since their common carrier service was in each instance but one provided within a single state (and not in connection with another carrier) it was an "intrastate communications service" within the meaning of Section 2(b)(1) and therefore that the service and the lines used to provide it were subject to state or local, not federal, regulation. The court held the service to be "interstate" solely because the carriers' lines are used to transmit interstate communications—*i.e.*, broadcast signals that cross state lines before being received by CATV operators and retransmitted along the carriers' lines. That holding is inconsistent with *Pennsylvania R.R.* v. *Public Utilities Commission*, 298 U.S. 170 (1936).

In that case the railroad contended that its common carrier service, although rendered solely within a single State, was an interstate service subject to ICC, not state, jurisdiction because the common carrier transported goods that had previously been transported across a state line. Describing such reasoning as a "confusion of thought," 298 U.S. at 174, this Court held that the common carrier service was "intrastate service," notwithstanding that the goods were moving in interstate commerce, since all of the common carriage in that case was provided entirely within one State. *See also, Pennsylvania R.R.* v. *United States*, 242 F.Supp. 890 (E.D.Pa. 1965), *aff'd*, 382 U.S. 372 (1966), a recent reaffirmation of the *Public Utilities Commission* doctrine.

The court below deemed these cases inapplicable, holding that the ICC's jurisdiction over transporta-

tion common carriers is more limited than the FCC's jurisdiction over communications common carriers under Title II of the Communications Act. In so holding, the court relied upon a pervasive regulatory power over communications common carriers that it thought was conferred by Title III of the Act, although that Title pertains only to the Commission's jurisdiction over broadcasters and other radio users.

In enacting the common carrier provisions (Title II) of the Communications Act Congress transferred jurisdiction over communication common carriers from the ICC to the FCC, and for the most part adopted with minor modification those provisions of the Interstate Commerce Act that are used for the regulation of rail common carriers.[9] What differences there are between Title II of the Communications Act and the Interstate Commerce Act reflect a Congressional intent to make the common carrier provisions of the Communications Act even more protective of state regulation than the provisions of the Interstate Commerce Act. *See,* 78 Cong. Rec. 8823 (1934) (Remarks of Sen. Dill, chairman of the Senate Committee that drafted and sponsored the Communications Act). Thus, the "Congressional policy of reserving exclusively to the States control over . . . essentially local activities" that underlies the Interstate Commerce Act, *Yonkers* v. *United States,* 320 U.S. 685, 690

[9] "In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of Congressional intent to attain a different objective." Sen. Rep. No. 781, Committee on Interstate Commerce, 73d Cong., 2d Sess., p. 2 (1934).

(1944), *a fortiori* applies to the common carrier provisions of the Communications Act.[10]

The Commission's power over broadcasters and other radio users under Title III of the Communications Act in no way overrides the specific provisions in Title II that were designed to preserve state regulation of common carriers. The Commission's Title III powers are applicable to common carriers only where the carriers themselves are radio users—*e.g.*, common carrier transmission by microwave, mobile radio service, etc. *See e.g., Carter Mountain Trans. Corp.* v. *FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). This case involves no radio transmission by common carriers, *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), and the court below therefore erred in holding that the decisions of this Court with respect to intrastate common carrier service were inapplicable in view of the Commission's power over broadcasting.

The court's error in confusing the Commission's Title II and Title III powers also controlled its determination of the issues arising under each of the other statutory provisions that limit the Commission's power in this case. It erroneously considered the Title III jurisdiction of the Commission as a sufficient basis for disregarding the ordinary meaning of the words Con-

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[10] The extent to which the common carrier provisions of the Communications Act preserve state and local regulatory authority is vividly illustrated by the fact that more than 75 percent of AT&T's investment in communication equipment, which totals more than $35,000,000,000, is not subject to the FCC's jurisdiction and is regulated instead by state and local agencies. AT&T, 9 F.C.C. 2d 30, 39 (1967).

gress used in imposing limitations upon the Commission's authority under Section 214(a). Thus, it held that an intrastate common carrier line could be combined with a non-common-carrier broadcast signal to form an "interstate line," in rejecting the carriers' argument that Section 214(a)(1) exempts their intrastate common carrier lines from certification. On the same rationale, it held that, despite the local character of the common carrier line here, Section 214(a)(2), which exempts "local, branch, or terminal lines" from FCC's jurisdiction, did not apply since the court believed the "central purpose" of this exemption would not be served by applying it to the provision of "TV service by CATV." Finally, the court rejected the argument of the connecting carriers for exemption under Section 2(b)(2), holding that the exemption, which pertains to all forms of communication, was meant only to protect state jurisdiction over "local telephone facilities," not facilities used for the transmission of signals by CATV operators.

CONCLUSION

The writ should be granted for each of the above-stated reasons.

Respectfully submitted,

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ATTACHMENT A

General Telephone System Companies:

General Telephone Company of California;
General Telephone Company of Indiana, Inc.;
General Telephone Company of Michigan;
General Telephone Company of Ohio;
General Telephone Company of Pennsylvania; and
General Telephone Company of the Southwest.

United Telephone System Companies:

United Inter-Mountain Telephone Company;
United Telephone Company of the Northwest;
United Telephone Company of Arkansas;
United Telephone Company of the Carolinas, Inc.;
United Telephone Company of Iowa;
United Telephone Company of Kansas, Inc.;
United Telephone Company of Missouri;
United Telephone Company of Ohio;
The United Telephone Company of Pennsylvania; and
The Columbia-United Telephone Company.

Bell System Companies:

The Chesapeake and Potomac Telephone Company of Virginia;
The Chesapeake and Potomac Telephone Company of West Virginia;
The Cincinnati and Suburban Bell Telephone Company;
The Diamond State Telephone Company;
Illinois Bell Telephone Company;
Indiana Bell Telephone Company;
Michigan Bell Telephone Company;
The Mountain States Telephone and Telegraph Company;
New England Telephone and Telegraph Company;
New York Telephone Company;
Northwestern Bell Telephone Company;
Ohio Bell Telephone Company;
Pacific Northwest Bell Telephone Company;

Pacific Telephone and Telegraph Company;
Southern Bell Telephone and Telegraph Company;
South Central Bell Telephone Company;
Southern New England Telephone Company;
Southwestern Bell Telephone Company; and
Wisconsin Telephone Company.

ATTACHMENT B

Alabama (Sec. 105, Tit. 48, Art. III, Alabama Code)
Alaska (Sec. 42.05.193, Alaska Stats.)
Arizona (Sec. 40-281 Arizona Rev. Stats.)
Arkansas (Sec. 73-240, Chap. 2, Arkansas Stats. Ann. (1957 replacement))
California (Sec. 1001, West's Ann. California Codes, Public Utility Code, Chap. 5, Art. 1)
Colorado (Sec. 115-5-1 Colorado Rev. Stats.)
Connecticut (Secs. 16-248 & 16-249, Chap. 283, Gen. Stats. of Connecticut, Revision of 1958)
Delaware (Sec. 162, Tit. 26, Delaware Code Ann.)
Florida (Sec. 364.33 Florida Stats. Ann.)
Georgia (Sec. 93-324 Code of Georgia)
Idaho (Sec. 61-526 Idaho Code)
Illinois (Sec. 56, Chap. 111⅔, Smith-Hurd Illinois Ann. Stats.)
Kansas (House Bill 1724, new laws 1968 p. 493).
Kentucky (Sec. 278.020 [3952-25], Tit. 24, Kentucky Rev. Stats.)
Louisiana (Sec. 4406, Tit. 33, Chap. 10, West's Louisiana Ann. Rev. Stats.)
Minnesota (Sec. 237.16 Minnesota Stats. Ann.)
Mississippi (Sec. 7716-05, Tit. 28, Chap. 5, Mississippi Code)
Missouri (Sec. 392.260 Vernon's Ann. Missouri Stats.)
Nebraska (Sec. 75-604 Rev. Stats. of Nebraska)
Nevada (Sec. 704.330 Rev. Stats.)
New Hampshire (Sec. 374:22 New Hampshire Rev. Stats.)
New York (Sect. 99, Book 47, Art. 5, McKinney Cons. Laws of New York Ann.)
North Carolina (Sec. 62-110 Gen. Stats. of North Carolina)
North Dakota (Sec. 49-03-01 North Dakota Century Code).
Oklahoma (Sec. 131, Tit. 17, Chap. 6, Oklahoma Stats.)
Pennsylvania (Sec. 1122, Tit. 66, Art. II, Purdon's Pennsylvania Stats. Ann.)
South Carolina (Sec. 58-378 Code of Laws of South Carolina)

Tennessee (Sec. 65-415 Tennessee Code)
Utah (Sec. 54-4-25 Utah Code)
Virginia (Sec. 56-265.2 Code of Virginia)
West Virginia (Sec. 24-2-11 West Virginia Code of 1961)
Wyoming (Sec. 37-31 Wyoming Stats.)

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FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,106

GENERAL TELEPHONE COMPANY OF CALIFORNIA, et al.,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

STORER BROADCASTING COMPANY, TELEPROMPTER CORPORATION, NATIONAL CABLE TELEVISION ASSN., INC., UNITED STATES OF AMERICA, *Intervenors,*

No. 22,112

UNITED INTER-MOUNTAIN TELEPHONE COMPANY, et al.,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

STORER BROADCASTING COMPANY, TELEPROMPTER CORPORATION, et al., STERLING INFORMATION SERVICES, LTD., NATIONAL CABLE TELEVISION ASSN., INC., UNITED STATES OF AMERICA, *Intervenors,*

No. 22,113

UNITED TELEPHONE COMPANY OF OHIO, et al., *Appellants,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

STORER BROADCASTING COMPANY, WARRENSBURG CABLE, INC., TELEPROMPTER CORPORATION, et al., STERLING INFORMATION SERVICES, LTD., NATIONAL CABLE TELEVISION ASSN., INC., UNITED STATES OF AMERICA, *Intervenors,*

No. 22,116

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, et al., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents,*

TELEPROMPTER CORPORATION, INC., NATIONAL CABLE TELEVISION ASSN., INC., STORER BROADCASTING COMPANY, CITY OF NEW YORK, COX-COSMOS, INC., *Intervenors.*

No. 22,143

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents,*

TELEPROMPTER CORPORATION, et al., NATIONAL CABLE TELEVISION ASSN., INC., STORER BROADCASTING COMPANY, *Intervenors.*

On Appeals from and on Petitions to Review a Decision and Order of the Federal Communications Commission

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Decided April 30, 1969

Before: BURGER, WRIGHT and ROBINSON, *Circuit Judges.*

BURGER, *Circuit Judge:* Petitioners and Appellants seek review to vacate a Decision and Order of the Federal Communications Commission under which the Commission determined that a certificate of public convenience and neces-

sity was required for the construction of distribution facilities to provide channel service to community antenna television systems, commonly called CATV. Petitioners and Appellants are operating telephone companies and their corporate parents, the American Telephone and Telegraph Company, General Telephone System, and United Utilities, Inc. For convenience all parties challenging the Commission's action will be referred to as "Petitioners."

(1) Background

The Commission held that Section 214(a) of the Communications Act of 1934, 47 U.S.C. § 214(a) (1962)[1] grants the Commission jurisdiction over common carrier facilities used to provide local distribution channel service to CATV operators transmitting broadcast signals from another state, notwithstanding that the particular distribution facilities are located within the boundaries of a single state. The Petitioners contended the facilities were intrastate and local in nature and hence not subject to the certification requirements of Section 214(a).

The Commission order directed the companies to file applications for construction certificates for all CATV channel service construction then in process and to cease and desist from further construction, and from the operation of existing facilities (with certain exceptions and qualifications) until certificates issued.

A CATV television system consists of three basic components:

(a) the receiving apparatus which picks up, by means of high antennae or microwave transmission, signals transmitted by television and FM radio;

(b) the "headend apparatus which converts, modifies and modulates the signal by electronic equipment so

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[1] For the full text of Section 214(a) see note 11, *infra*.

that the signal received can be transmitted along a coaxial cable; and

(c) the coaxial cable distribution system which carries the converted signal to the premises of the CATV subscriber.

This third component (c) consists of three parts: the trunk or "feeder" coaxial cable which begins at the headend and carries the signal on the first leg of its journey, the distribution cables which carry the signal from the "feeder" lines to the immediate vicinity of the subscriber, and the "droplines" which carry it from the distribution cable to the terminal block on the subscriber's premises.[2]

Many CATV operators have constructed their own facilities for reception and distribution and the Commission does not assert common carrier jurisdiction over such systems. Others run their distribution cable over existing poles of utility systems by private contract with that utility. Neither of these types of operations involves a common carriage. Other CATV operators contract with a telephone system to provide the entire channel service distribution which carries the signal from the headend to the subscriber's home. In this proceeding the Commission considered only this latter mode of distribution by which the Petitioners supplied channel service transmission.

(2) Commission Proceedings

In April 1966, the Commission initiated a proceeding and directed the operating companies of the General Telephone System and Bell System to file tariffs covering CATV channel distribution facilities. Bell and General did so under protest and a petition for reconsideration was

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[2] A final "cable" is then run from the terminal block to the subscriber's television set.

The coaxial cable utilized by the carriers to provide the service can simultaneously carry 12 television channels at VHF frequencies and the entire FM radio band.

denied.[3] In October 1966, the Commission initiated an inquiry into the lawfulness of tariffs filed by General Telephone Company of California.[4] Thereafter, similar pro-

[3] Common Carrier Tariffs for CATV systems, 4 F.C.C. 2d 257 (1966). In reaffirming its jurisdictional base for requiring the filings, the Commission relied upon Section 202(b), 47 U.S.C. § 202(b) (1962), and this court's decision in Idaho Microwave, Inc. v. FCC, 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965). The Commission also explained:

> A.T.&T. claims that the CATV operator performs certain conditioning and intervening procedures before the TV signals are further transmitted over the service in question. However, no claim is made that there is any significant interruption of the continuous flow of the signals from the TV station to the home viewer or that the program material transmitted by the TV station is materially different from the program material received by the home viewer from such station.
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> As we have heretofore stated, we think it clear that we are dealing with the regulation of tariffs for interstate communication service.
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> 14. It is true, as argued by A.T. & T., that the Commission has disclaimed tariff regulatory jurisdiction over CATV operators. However, such disclaimer followed from our finding that CATV operators are not engaged as communication common carriers within the contemplation of the Communications Act and that therefore such operators are beyond the reach of section 202(b) of the act. We are unable to make any such disclaimer in the case of telephone companies which furnish channels of communication to CATV operators, for the provision of such service is clearly a common carrier undertaking. Thus, the short answer to A.T. & T.'s policy arguments is that Congress has supplied the controlling policy guidance in section 202(b) of the act, recognizing, as it does, that there is a need for regulatory consideration by the central Federal agency of this type of activity by a common carrier, linked as it is with broadcasting.

4 F.C.C. 2d at 259-60.

[4] California Water and Tel. Co., 5 F.C.C. 2d 229 (1966). California Water and Telephone was subsequently merged with General Telephone Company of California and the latter was substituted as a party to the proceedings.

ceedings were initiated as to the operating subsidiaries of Bell,[5] General, and United Utilities, Inc.[6] These proceedings were expanded to include not only questions of the lawfulness of tariffs, but also the applicability of Section 214 of the Communications Act. By Order adopted January 11, 1967, all the above proceedings were consolidated for hearing.[7]

Subsequently, in Orders adopted March 29, 1967 and released April 3, 1967, the Commission deleted the Section 214 issues from the above-mentioned consolidated hearings[8] and initiated a separate consolidated proceeding to hear these issues.[9] This action was taken in response to allegations by General and California that insofar as the proceedings dealt with Section 214 matters, they were adjudicatory in nature and required the more formal procedural strictures of adjudicatory determinations. The Commission reasoned that in addition to resolving the purely legal questions, the Section 214 "issues contemplate that the Commission may take specific remedial actions, including the issuance of cease and desist orders, against individual carriers on the basis of the evidence adduced." 7 F.C.C. 2d at 572. Therefore, the Section 214 questions were excised and designated for separate hearing on the following issues:

> (a) Whether (with respect to the Bell System companies) the requirements of section 214 of the act and part 63 of our rules implementing that section have been met as to the facilities used to offer channel service under the aforesaid tariffs and, if not, what action, if any, the Commission should take with respect thereto;

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[5] The Associated Bell Systems Cos., 5 F.C.C. 2d 357 (1966).

[6] The General Tel. System, *et al.*, 6 F.C.C. 2d 434 (1967).

[7] California Water and Tel. Co., *et al.*, 6 F.C.C. 2d 440 (1967).

[8] California Water and Tel. Co., *et al.*, 7 F.C.C. 2d 571 (1967).

[9] California Water and Tel. Co., *et al.*, 7 F.C.C. 2d 575 (1967).

(b) Whether (with respect to the non-Bell System companies) any of the respondents are subject to the requirements of section 214 of the act and part 63 of our rules implementing that section and, if so, whether these requirements have been met as to the facilities used to offer CATV channel service under the aforesaid tariffs and what action, if any, the Commission should take with respect thereto.

Following the evidentiary hearing and the Examiner's certification of the record pursuant to Section 409(a) of the Act the Commission heard oral argument *en banc,* and its Decision and Order were released on June 26, 1968. *General Tel. Co. of California, et al.,* 13 F.C.C. 2d 448 (1968).[10] Essentially, the Commission found that the CATV channel service furnished by the carriers constituted "a

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[10] The Commission's view of the issues raised are:

(1) whether the channel service offerings relate to common carrier communications service undertakings; (2) whether the intelligence transmitted or to be transmitted by the telephone companies are interstate communications subject to the Commission's jurisdiction; (3) whether the construction under consideration, which does not cross a state boundary, is purely an intrastate line and therefore exempt under Section 214(a)(1) from the certification requirements or is part of an interstate line; (4) even if part of an interstate line, whether the construction relates to facilities which are "local, branch, or terminal lines not exceeding ten miles in length" and therefore exempt pursuant to Section 214(a)(2) of the Act; and (5) whether the service offered in each of the several tariffs is a "telephone exchange service" within the contemplation of Section 221(b) of the Act and therefore not subject to Commission jurisdiction. On behalf of those carriers which heretofore have been classified as "connecting carriers" pursuant to the provisions of Section 2(b)(2) of the Act, the contention is advanced that Section 214(a) is inapplicable to them even if determined to be applicable to the "fully subject" carriers.

13 F.C.C. 2d at 453-54 (1968).

common carrier undertaking" and that Section 214 certificates of public convenience and necessity were required for the construction of the channel distribution systems employed in providing this interstate communications service.[11] The Commission also determined that the service

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[11] Section 214(a), 47 U.S.C. § 214(a) (1962), provides:

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

provided by these carriers was not "intrastate communication service" within the Section 2(b)(1) exemption.[12] In addition the Commission determined that the construction in question did not fall within the exemptions of Section 214(a)(1) covering "a line within a single state unless such line constitutes part of an interstate line." Likewise, the Section 214(a)(2) exemption covering "local, branch, or terminal lines not exceeding ten miles in length," and the Section 221(b) provision exempting "services, facilities . . . for or in connection with . . . telephone exchange service" were found to be inapplicable.[13] The Commission also rejected the contentions of those petitioners which claimed that their prior classification as "connecting carriers" exempted them from its regulatory authority pursuant to Section 2(b)(2) of the Act.[14]

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[12] Section 2(b), 47 U.S.C. § 152(b) (1962), provides in relevant part:

> (b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . .

[13] Section 221(b), 47 U.S.C. § 221(b) (1962) provides:

> (b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

[14] For the text of Section 2(b)(2), 47 U.S.C. § 152(b)(2) (1962), see note 12, *supra*.

Pursuant to these findings the Commission directed the operating telephone companies of Bell, General, and United to file applications for certificates of public convenience and necessity pursuant to Section 214 as respects all construction theretofore undertaken to provide channel service to CATV systems. The Commission also directed these parties to cease and desist from constructing additional facilities until certificates have been obtained, and to cease and desist from operating previously completed facilities until applications for certification had been filed and certain additional conditions had been met. These conditions varied to meet special problems of individual carriers and included references to the particular party's date of notice of the possible applicability of Section 214, the percentage of construction and expenditure up to the notice date, and the nature of the affiliation existing between the particular carrier and CATV operator.[15]

(3) Questions Presented

The basic and dispositive issue is whether the Communications Act vests in the Commission jurisdiction over channel transmission service and facilities of telephone companies constructed to carry TV and FM radio signals by wire between a CATV antenna (or microwave received) and the subscribers, when the reception and transmission facilities are entirely within one state and when they are constructed to provide transmission service to CATV oper-

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[15] In a Memorandum Opinion and Order adopted July 26, 1968, the Commission partially stayed the provisions of its cease and desist orders pending review in this court. Those provisions relating to the construction of new facilities or the operation of facilities fully or partially constructed but not operational on the date of the Commission's principal opinion were not stayed; all other provisions relating to CATV channel distribution facilities constructed and in operation on or before June 26, 1968, were stayed. General Tel. Co. of Cal., *et al.*, 14 F.C.C. 2d 170 (1968).

ators carrying signals which originate from TV and FM broadcasters in another state.

An additional question is, assuming such jurisdiction exists, is the Commission authorized to enter a cease and desist order under Section 312.

Some hint of the magnitude and significance of the problems raised on this appeal is suggested by the growth of CATV in a brief period and the extent of the involvement of the telephone carriers in providing distribution facilities and service to CATV operators. By 1967 six of the 33 operating companies of the General Telephone and Electronics Corporation were involved in eight channel services, and other construction was contemplated; other General operating companies were directly engaged in CATV operation. A wholly owned General subsidiary engaged in CATV is a customer in 10 of the distribution systems of General carriers; this subsidiary owned 36 CATV systems and franchises.

Bell System Companies by 1967 were supplying channel transmission services to 178 separate communities identified in the record. United Utilities, parent of the United operating telephone companies, supplied channel service in 31 communities; in all but one of these communities United Utilities is the sole or major stockholder in these CATV systems.

A summary of Petitioners' investment in channel service indicated that General has invested over $2,000,000 in ten communities; United, $800,000 in six communities; Bell, $1,360,000 in four communities: Bell's total investment cost in channel service systems is in excess of $43,000,000, and other telephone systems have also invested large sums. The projected future development is not indicated in the record but the amounts involved for the number of communities now being served suggest the magnitude of the potential in CATV distribution by common carriers.

(4) Nature of Services

The primary challenge to the Commission's action is that it has improperly asserted jurisdiction over intrastate activities. Such regulation, it is contended, transgresses the original congressional distinction between local and national activities, a dividing line which was drawn to achieve a balance between state and national regulation rather than to allow preemption of local control by comprehensive federal regulation. Great reliance is placed on the fact that the physical facilities of all but one of the common carrier lines used for CATV distribution service are located within the boundaries of a single state[16] and on Section 2(b)(1) of the Act which provides in part:

> (b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply to or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations *for or in connection with intrastate communication service by wire or radio of any carrier* . . . .

47 U.S.C. § 152(b) (1964) (emphasis added).

The Petitioners insist that service wholly within a single state, when there is no common carriage *across* state lines, is "intrastate service," even though the subject matter of that service—the interstate broadcast signal—may itself be regarded as interstate communication. In their view the crucial fact is *the character of the common carrier service and facilities involved.* This, and not the transmission itself, it is argued, should determine whether a communication service is intrastate or interstate in character; Peti-

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[16] The Commission did not question the intrastate physical location of the facilities in arriving at its determination. It listed United Telephone Company of the Northwest as the only operating company with cable facilities crossing a state boundary. This determination was not challenged. 13 F.C.C. 2d at 455 n.15.

tioners insist that it is error for the Commission to consider interstate communication as the functional equivalent of interstate communication *service.*

In evaluating this contention the Commission placed chief reliance on what it considered to be an examination of the actual service which the carriers perform in relation to the total transmission process which carries the broadcast signal from the broadcaster to the television set of the individual viewer:

> The controlling facts here are that the cable facilities furnished by the telephone companies are links in the continuous transmission of the signals from the point of origin to the set of the viewer, and the intelligence received by the viewer is essentially the same as that transmitted by the broadcaster. *Irrespective of the location of its physical facilities, the common carrier which thus participates as a link in the relay of television signals is performing an interstate communications service.*

13 F.C.C. 2d at 455 (1968) (emphasis added).

At the time of the enactment of the Communications Act, Congress could not and indeed did not try to anticipate all of the developments which might occur.[17] Fundamentally it viewed the "air waves" as a public resource to be utilized and regulated in the public interest. Basic to its approach was that radio broadcasting was subject to federal jurisdiction without regard to transmission over state lines in the traditional interstate commerce sense.

Over the years, the Commission has been required to meet new problems concerning CATV and as cases have reached the courts the scope of the Act has been defined, as Congress contemplated would be done, so as to avoid a

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[17] *Cf.* Fortnightly Corp. v. United Artists, 392 U.S. 390 (1968).

continuing process of statutory revision.[18] To do otherwise in regulating a dynamic public service function such as broadcasting would place an intolerable regulatory burden on the Congress—one which it sought to escape by delegating administrative functions to the Commission.

Our evaluation of the Commission's interpretation of the scope of its jurisdiction must take into account the Act's broad purposes and objectives. We cannot ignore specific exemptions and limitations which narrow its regulatory powers, but neither can we overlook that Congress sought to establish a pervasive jurisdiction over broadcasting. The Act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole.

Petitioners point out that Section 2(a) of the Act is limited "to all interstate and foreign communication by wire or radio . . ." and from this argue that intrastate communication is thereby necessarily excluded. The relationship of Section 2(a) and 2(b)(1) is suggested as emphasizing the exclusion of communication facilities within one state.

In *Idaho Microwave, Inc.* v. *FCC*, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965), we dealt with the Commission's power to regulate, by use of conditions on a license, microwave communication facilities located entirely within the State of Idaho, but used to carry signals from Utah stations to a CATV system in Burley, Idaho. Our holding in pertinent part was:

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[18] *See* American Broadcasting Co. v. FCC, 89 U.S. App. D.C. 298, 304, 191 F.2d 492, 498 (1951), *quoting* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940), where we explained:

> Underlying the [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.

> . . . The Burley facility is used as a link in the continuous transmission of television signals from Salt Lake City to Burley, Idaho; there is no interruption in the flow of the signals, as it is practically instantaneous. Thus, though Idaho Microwave's physical facilities are located within Idaho, it performs an interstate communication service when it takes part in the transmission of signals from Utah to Idaho.

Id. at 256, 352 F.2d at 732, *citing, Ward* v. *Northern Ohio Tel. Co.*, 300 F.2d 816 (6th Cir.), *cert denied*, 371 U.S. 820 (1962); *see Pacific Teletronics, Inc.*, 37 F.C.C. 1163 (1964).

Similarly in *California Interstate Tel. Co.* v. *FCC*, 117 U.S. App. D.C. 255, 328 F.2d 556 (1964), we found no difficulty in affirming a Commission determination that broadcast signals from Pasadena to Goldstone, both within California, for relay to spacecraft were a part of "foreign commerce" and subject to federal jurisdiction:

> It is true that the only earth stations involved in this system are at Goldsone and Pasadena, both in California. The record shows, however, that the purpose of the system is to provide communication between spacecraft and Pasadena, the "bouncing through" Goldstone being practically instantaneous. Voice communications between Goldsone and Pasadena will be subordinate to data, and will be used primarily to coordinate the system and to check on its operating characteristics. Being merely adjuncts to the transmission of signals between Pasadena and spacecraft, the voice and data transmissions between Pasadena and Goldstone will be, as the California Commission said, "secondary and subsidiary to the primary use of radio communication and data transmission in interstate or foreign commerce."

Id. at 259, 328 F.2d at 560.

Petitioners point out that the Bell System operating companies have held out common carrier channel service for local service to CATV operators since 1959, but that the Commission asserted no jurisdiction until the 1966 proceedings. Prior to 1966 such common carrier service was subject only to local and state agencies and tariffs for such service had been filed where required. It is also correct that in 1959 the Commission expressed the view that although CATV related to interstate communication it did not contemplate regulation of such systems. However, the explosive growth of CATV led the Commission to alter its view, particularly after the Congress failed to adopt amendments which would have clarified the status of CATV. See Second Report & Order, 2 F.C.C. 2d 725, 738 n. 15.

An early step was to regulate the activities of common carrier microwave facilities serving CATV systems. In *Carter Mountain Transmission Corp.* v. *FCC*, 116 U.S. App. D.C. 93, 321 F.2d 359, *cert. denied*, 375 U.S. 951 (1963), we reviewed a Commission decision which had denied an application by a common carrier to construct a microwave radio communication system to serve a CATV operator. The Commission action was based on the finding that a grant would not serve the public interest because of the adverse impact on a local television station. In challenging the Commission's determination, the carrier asserted that the Commission had erroneously applied principles of "radio broadcast law" to a situation involving "common carrier licensing." This challenge was in part based upon the proposition that the Communications Act contemplates the regulation of common carriers "in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission." *Id.* at 96, 321 F.2d at 362.

We rejected this stilted interpretation of the Act, recognizing the vast difference between "questions of competitive injury in the transportation field" and "questions of public injury in the field of communications." *Id.* In doing so,

we emphasized the soundness of allowing the Commission to consider its total regulatory responsibilities when dealing with problems within a particular area of its jurisdiction:

> Here the Federal Communications Commission is charged with the duty of regulating not only common carriers by radio but broadcasters of television programs. It cannot let its decisions in the radio carrier field interfere with its responsibilities in the television broadcasting field. In both fields, it must "make available, so far as possible, to all the people of the United States," adequate and efficient service.

Id.

In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the Supreme Court had occasion to review the brief but spectacular history of CATV growth. Justice Harlan, for the Court, noted that in 1962, the Commission had reconsidered and re-evaluated the significance of CATV and the scope of the Commission's responsibilities, and it concluded that "the likelihood or probability of (CATV's) adverse impact upon potential and existing services has become too substantial to be dismissed." First Report & Order, 38 F.C.C. 683, 713-14. The Second Report & Order, 2 F.C.C. 2d 725, followed, in which the Commission determined that the Act confers regulatory authority over all CATV systems. In exercise of this comprehensive jurisdiction the Commission restricted the importation by CATV of distant signals into the 100 largest TV markets. *Id.* at 781-785.

Addressing the issues raised in *Southwestern Cable*, Justice Harlan then said:

> We must first emphasize that questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court. The issues in these cases are only two:

whether the Commission has authority under the Communications Act to regulate CATV systems, and, if it has, whether it has, in addition, authority to issue the prohibitory order here in question.

The Commission's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended. The Act's provisions are explicitly applicable to "all interstate and foreign communication by wire or radio . . . ." 47 U.S.C. § 152(a). The Commission's responsibilities are no more narrow: it is required to endeavor to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ." 47 U.S.C. § 151. The Commission was expected to serve as the "single Government agency" with "unified jurisdiction" and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." It was for this purpose given "broad authority." As this Court emphasized in an earlier case, the Act's terms, purposes, and history all indicate that Congress "formulated a unified and comprehensive regulatory system for the (broadcasting) industry." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137.

Respondents do not suggest that CATV systems are not within the term "communication by wire or radio." Indeed, such communications are defined by the Act so as to encompass "the transmission of . . . signals, pictures, and sounds of all kinds," whether by radio or cable, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. §§ 153(a), (b). These very general terms amply suffice to reach respondents' activities.

> Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that "is not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 279.

392 U.S. at 167-69 (footnotes omitted).

As we view the record now before us and consider it in light of our own holdings and the relevant holdings of the Supreme Court it seems clear that as the outlines of the CATV problem emerged the Commission acted within the scope of the Act and consistently with the broad purposes of the Act by treating its responsibilities as comprehensive and pervasive. Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority; fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication. The Supreme Court aptly characterized the functional aspect of the CATV systems as an "essentially uninterrupted and properly indivisible" stream of communication.

The Commission has construed its own statutory grant after much study and indeed not without periods of doubt and reservation as embracing all links, including strictly intrastate links, as being part of the interstate transmis-

sion. Its interpretation of its grant and its application are entitled, of course, to great deference. The Petitioners have, by choice, inserted themselves as links in this indivisible stream and have become an integral part of interstate broadcast transmission. They cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission." *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mtge. Co.*, 289 U.S. 266 (1933).

(5) Applicability of Exemptions Under Section 214

Notwithstanding the Commission's determination that Petitioners are engaged in providing interstate communication services, the Petitioners assert that various specific provisions of the Act, apart from their claims of the intrastate character of their facilities, exempt them from Commission jurisdiction. Having previously rejected their major premise, our consideration of these arguments has been facilitated.[19]

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[19] The carriers assert two exemption claims which we feel do not merit extended discussion.

The first rests on Section 221(b)'s exclusion of facilities "for or in connection with . . . telephone exchange service." See note 13, *supra,* for the full text of Section 221(b). On this point, we agree with the Commission's summary rejection of this contention as "inconsistent with the plain meaning of the words used." Section 3(r) of the Act, 47 U.S.C. § 153(r) (1964), defines "telephone exchange service" as:

> service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

Clearly, CATV channel distribution service does not contemplate furnishing subscribers with "intercommunicating service" of the type usually identified with a telephone exchange.

A second claim of exemption rests on Section 2(b)(2)'s exclusion of carriers "engaged in interstate or foreign communication solely

Petitioners contend that the cable distribution systems employed by all but one operating company [20] are exempt by Section 214(2)(1)'s exclusion of "a line within a single State unless such line constitutes part of an interstate line" because none of their facilities cross a state boundary. The Commission met this allegation directly by relying on the Section 214(a) definition of "line" as "any channel of communication established by the use of appropriate equipment." The Commission did not read Section 214(a)(1) to mean that an intrastate common carrier line had to be connected to an interstate *common carrier line* before it could be subjected to certification requirements.

Given the already articulated interstate nature of the service being provided, we cannot conclude that the Commission abused its authority to construe these remedial provisions in a way to effectuate the ultimate regulatory scheme of the Act.[21] These carriers are an integral component in the indivisible dissemination system which forms

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through physical connection with the facilities of another carrier . . . ." See note 12, *supra*, for the full text of Section 2(b)(2). The Commission decided only that the *CATV channel service* provided by the connecting carriers in question is not exempted from Section 214(a)'s certification requirements. This ruling in no way affected their status as connecting carriers with respect to their other interstate activities which continue to fall wihin the legitimate intendment of § 2(b)(2). We agree with the Commission's view that the "character of the communication" which prompts the construction is the pertinent consideration. *See Ward v. Northern Ohio Tel. Co., supra.* The exclusion embodied in Section 2(b)(2) was meant to protect State jurisdiction over local telephone facilities which could place interstate calls through their connection with major toll lines; this interstate facet of the company's operation was incidental to its primary local service. To characterize the interstate connections of a CATV channel distribution system as "incidental" to any other function it may perform would be at best a myopic view of its true activities.

[20] See note 16, *supra.*

[21] *See* note 18, *supra.*

an interstate channel of communication from the broadcaster to the viewer. As such, they are reasonably characterized as a "part of an interstate line" within the language of Section 214(a)(1).

The correctness of this analysis becomes even more evident when the alternative offered by the carriers is considered. As noted previously, the Commission has jurisdiction over broadcasters and CATV operators. Likewise, the Commission has jurisdiction over the construction and alteration of interstate common carrier facilities pursuant to the general provisions of Section 214(a). Here, the channel distribution systems are provided by common carriers to already-regulated CATV operators who in turn are merely relaying the signals of fully-regulated broadcasters. Therefore, coaxial cable construction by these operating telephone companies directly affects two types of operations already subject to Commission regulation and is provided by a party otherwise covered by Title II common carrier provisions. To give the Act the overly restrictive interpretation urged by Petitioners would be to prevent the Commission from employing the regulatory devices which have been established for effective common carrier control—a particularly sterile result when the carrier activity is augmenting the operations of parties which are the particular concern of the Commission's regulatory responsibility. *See Carter Mountain, supra.* We have previously noted that the Commission's regulatory and enforcement powers should not be artificially fragmented or compartmentalized when the result would be to frustrate a comprehensive, pervasive regulatory scheme.[22]

The other major basis for the carriers' claim of exemption is Section 214(a)(2)'s exclusion of "local, branch, or terminal lines not exceeding ten miles in length." In dis-

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[22] *See* Buckeye Cablevision, Inc. v. FCC, 128 U.S. App. D.C. 262, 267, 387 F.2d 220, 225 (1967). *See also* discussion in part 6, *infra.*

missing this assertion, the Commission never reached the ten-mile-length limitation because it determined that the establishment of these channel distribution systems constituted construction of "'main' communication lines which should have been certificated." This finding rested on the conclusion that the concept of "local, branch, or terminal" lines is not consistent with the proposed construction of facilities which will involve "new construction by the telephone companies in order to provide new customers with a type of service significantly different from that theretofore provided in said communities." 13 F.C.C. 2d at 459.

This provision of Section 214(a) has not been previously construed, and the legislative history does not furnish dispositive guidance. We therefore are confronted with the well-accepted rule that the administrative agency should be given deference in its interpretation of the statutory scheme it is charged with administering.[23] This is particularly appropriate when the reviewing court preliminarily views the interpretation as one directed at achieving the reasonably authorized purposes of the legislation in question.[24]

In this instance, we are persuaded that the Commission has focused on the central purpose of this exemption. Section 214(a)(2) was meant to permit nonsubstantial improvements or extensions for existing carrier facilities without calling for a continuous stream of burdensome applications for Commission approval. *Cf. Texas & Pac. Ry. Co.* v. *Gulf, Colo. & S.F.Ry.Co.*, 270 U.S. 266 (1926).[25]

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[23] *E.g.*, Udall 1. Tallman, 380 U.S. 1 (1965); Unemployment Comp. Comm'n v. Aragon, 329 U.S. 143 (1946); *see* Philadelphia Television Broadcasting Co. v. FCC, 123 U.S. App. D.C. 298, 359 F.2d 282 (1966).

[24] *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

[25] *See* also 78 Cong. Rec. 10,314 (1934) (remarks of Rep. Rayburn); 78 Cong. Rec. 10,987 (1934) (remarks of Rep. Rayburn).

It is reasonable to assume that Congress was not troubled by the prospect of a local telephone company running an extension line to a cluster of houses in a new subdivision near existing facilities It is quite another matter to suggest that it meant to exempt a carrier's efforts to install an entire network consisting of "trunk," "distribution," and "dropline" cables to provide TV service via CATV to an area that has theretofore been without such broadcast distribution facilities.

We think that the Petitioners misconstrue the purpose of the exemption when they read its provision to encompass the *initial construction* of a distribution component capable of carrying broadcast signals to a substantial number of viewers. Without deciding the point, we may assume that they would be more comfortably within the intendment of Section 214(a)(2)'s exemption were they proposing the nonsubstantial extension of *existing channel service facilities* of the type now under consideration. Instead, they have sought to force the camel through the needle's eye by arguing that an exemption providing for improvements and extensions can be construed to allow the initial construction of facilities. The Commission's rejection of that proposition seems entirely sound to us.

(6) The Commission's Cease and Desist Orders

The Petitioners also challenge the Commission's resort to the cease and desist provisions of Section 312(b)[26] as a means of arresting the continued construction and opera-

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[26] Section 312(b), 47 U.S.C. § 312(b) (1962), provides:

> (b) where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 of Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

tion of certain channel distribution systems.[27] The thrust of their argument is that Section 214(c)[28] embodies the Commission's exclusive method of enforcement to thwart abuses of the certification provisions. Section 214(c) allows the Commission to seek a court injunction to prevent construction or operation until the requirements of Section 214 are satisfied. This reasoning is based on the proposition that Section 312(b), which was inserted in Title III when the Act was amended in 1952, is completely inapplicable to the provisions of Title II dealing with the regulation of common carriers.

The direct answer to this analysis is contained in the language of the two sections. Initially, Section 312(b) makes clear that it is directed at "*any person* . . . [who]

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[27] As previously noted, the Commission stayed portions of its Order as respects certain carriers. See note 15, *supra*.

[28] Section 214(c), 47 U.S.C. § 214(c) (1962), provides:

> (c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

has violated or failed to observe *any of the provisions of this Act* . . . [or] *any rule or regulation of the Commission authorized by this Act* . . . ." The pervasive application of the language employed in Sections 312(b)(2) and 312(b)(3) is suggested by Section 312(b)(1)'s narrower reference to "any person [who] has failed to operate substantially *as set forth in a license* . . . ." It seems that when the drafters intended to focus on licensees, they had no problem doing so.

Nor does the clear language of Section 214(c) suggest its exclusivity. The section employs *permissive* terminology in that "construction . . . operation . . . contrary to the provisions of this section *may be enjoined* . . . ." Such language does not usually imply that no other remedy is contemplated. Moreover, in addition to the Commission, Section 214(c)'s enforcement techniques are available to the United States, a state or state commission, or any party in interest. This too would suggest that it was not meant to be a remedy particularly adapted to the needs of an expert regulatory body and consequently a remedy that could serve as the administrative body's sole enforcement machinery in this area.

The contention that Section 312(b)'s enforcement techniques are restricted in applicability to those parties particularly subject to the general regulatory provisions of Title III also runs contrary to the reasoning of recent decisions emphasizing the flexibility which an expert regulatory agency must possess if it is to keep pace with a still burgeoning industry. We noted in *Buckeye Cablevision, Inc.* v. *FCC,* 128 U.S. App. D.C. 262, 267 n. 19, 387 F.2d 220, 225 n. 19 (1967), that we were not disposed to the suggestion that "the Commission's powers are rigidly compartmentalized into 'licensing' and 'public utility regulation' functions." In *Buckeye,* this court upheld a cease and desist order which the Commission had issued against a CATV operator, a member of a class which the Commis-

sion,[29] this court,[30] and the Supreme Court [31] have recognized as not readily encompassed within the clear language of either Title II or Title III. The interest there respected was one of preserving the Commission's capacity to respond to changes which necessarily emanate from a dynamic industry. *See Southwestern, supra; Valley Vision, Inc.* v. *FCC*, 399 F.2d 511 (9th Cir. 1968). Were the language of Section 312(b) not so dispositive of the propriety of the Commission's action, this consideration itself might well be.

Our review satisfies us that the Decision and Order of the Commission should be

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1968

No. 22,106

GENERAL TELEPHONE COMPANY OF CALIFORNIA, et al.,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

STORER BROADCASTING COMPANY, TELEPROMPTER CORPORATION, NATIONAL CABLE TELEVISION ASSN., INC., UNITED STATES OF AMERICA, *Intervenors,*

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[29] Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958).

[30] Philadelphia Television Broadcasting Co. v. FCC, 123 U.S. App. D.C. 298, 359 F.2d 282 (1966).

[31] United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

No. 22,112

UNITED INTER-MOUNTAIN TELEPHONE COMPANY, et al., *Appellants*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,

STORER BROADCASTING COMPANY, TELEPROMPTER CORPORATION, et al., STERLING INFORMATION SERVICES, LTD., NATIONAL CABLE TELEVISION ASSN., INC., UNITED STATES OF AMERICA, *Intervenors*,

No. 22,113

UNITED TELEPHONE COMPANY OF OHIO, et al., *Appellants*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,

STORER BROADCASTING COMPANY, WARRENSBURG CABLE, INC., TELEPROMPTER CORPORATION, et al., STERLING INFORMATION SERVICES, LTD., NATIONAL CABLE TELEVISION ASSN., INC., UNITED STATES OF AMERICA, *Intervenors*,

No. 22,116

THE CHESAPEAKE AND POTOMAC TELEPHONE CFMPANY OF VIRGINIA, et al., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*,

TELEPROMPTER CORPORATION, INC., NATIONAL CABLE TELEVISION ASSN., INC., STORER BROADCASTING COMPANY, CITY OF NEW YORK, COX-COSMOS, INC., *Intervenors*,

No. 22,143

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*,

TELEPROMPTER CORPORATION, et al., NATIONAL CABLE TELEVISION ASSN., INC., STORER BROADCASTING COMPANY, *Intervenors*.

On Appeals from and on Petitions to Review a Decision and Order of the Federal Communications Commission

Before: BURGER, WRIGHT and ROBINSON, *Circuit Judges*.

Judgment

These cases came on to be heard on the record from the Federal Communications Commission, and were argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the Decision and Order of the Federal Communications Commission dated June 26, 1968, is hereby affirmed.

Per Curiam

For the Court:

NATHAN J. PAULSON
Clerk

Dated: April 30, 1969.
Opinion by Circuit Judge Burger.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

DOCKET NO. 17333

In the Matter of

GENERAL TELEPHONE COMPANY OF CALIFORNIA (formerly California Water and Telephone Company) THE ASSOCIATED BELL SYSTEM COMPANIES, THE GENERAL TELEPHONE SYSTEM AND UNITED UTILITIES, INC. COMPANIES

Applicability of Section 214 of the Communications Act with Regard to Tariffs for Channel Service for Use by Community Antenna Television Systems

Decision

Adopted June 25, 1968; Released June 26, 1968

Commissioner Lee for the Commission: Commissioner Loevinger took no part in the decision of this case.

1. This adjudicatory proceeding concerns one phase of a controversy between the operators of community antenna television systems (CATV) and the major communications common carriers which has presented numerous problems to the Commission for resolution. A brief recitation of the background facts leading up to this proceeding is essential to an understanding of the matters now before us for consideration.

2. A CATV system is a facility which receives television signals and FM radio signals off the air by means of high antennas or by microwave transmission, amplies the signals, and distributes such signals by coaxial cable to the

premises of its subscribers who pay a fee for the service.[1] The system consists of a number of connecting sections which may be characterized as the reception, headend, and distribution systems. At the beginning of the system are located the towers, antennas, microwave receivers, and other equipment necessary to receive the program material. The headend section consists of the electronic equipment used to convert, modify and modulate the signals bearing the intelligence received at the antenna before traveling into the wire distribution system. Generally, the headend equipment is located in a building adjacent to the tower, although this is not essential. The distribution system consists of feeder or trunk lines which originate at the headend and may be branched repeatedly to reach different sections of the system; the smaller distribution cables which carry the signal to the immediate vicinity of the subscriber; and the "drop" wires which carry the signal from the distribution cable to a terminal block on the premises of the individual subscriber. The final link in the system is the cable extending from the terminal block to the television set of the subscriber.

3. In some instances the distribution system is provided by the CATV owner who either constructs all of the necessary facilities or strings his cable on the poles of a utility company for which a rental fee is paid pursuant to a pole line attachment. In other cases, the telephone company serving the CATV community provides the channel service transmission system. While in some instances the telephone company provides the headend equipment, it generally provides service only from the headend to the premises of the subscriber. We are concerned in this proceeding only with channel service offerings by telephone companies to CATV systems, not with the distribution system constructed by the CATV owner or provided pursuant to pole line attachment arrangements.

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[1] See Section 74.1101(a) of the Rules.

4. On April 6, 1966, the Commission sent letters to the American Telephone and Telegraph Company (AT&T) and General Telephone and Electronics Service Corp. (General) directing the operating telephone companies of the Bell System and the General Telephone System to file tariffs for local distribution facilities furnished for the use of CATV systems. Upon petition of the carriers, reconsideration was denied. *Common Carrier Tariffs for CATV Systems,* 4 FCC 2d 257, adopted June 22, 1966, and released June 29, 1966. Therein the Commission held that the services offered constitute an interstate communications service, that the furnishing of channels of communication to CATV operators is "clearly a common carrier undertaking," and that the Commission has properly required the tariffs to be filed.

5. Pursuant to the Commission's orders, tariffs have been filed by thirty-four telephone companies of which eighteen are Bell operating companies, six are General, and ten are operating companies in the system of United Utilities, Inc. The Bell tariffs provide in general that they apply "to interstate channels or portions of interstate channels furnished within the operating territory" of the carrier for the "one-way transmission of broadcast television and FM radio program material" from a specified input point to a specified output point, the direction of which "may not be reversed." Nonexclusive service is offered for the "simultaneous transmission of a maximum of twelve (12) broadcast television signals" with routes and type of construction to be determined by the telephone company, the charge for which depends on the length of the feeder and distribution cable and the number (but not the length) of the drops at subscribers' premises. The Bell tariffs further state that no "connecting" or other carrier participates in furnishing the service offered. With minor variations in language and in the extent of the service

offered,[2] the offerings in the tariffs filed by General[3] are like those filed by Bell. Charges for the feeder and distribution cable are based on the length of the cable and those for "channel terminations" (apparently the same as "drops") on the number installed. The tariff provisions of United do not differ materially from the other two and the charges also are based on the length of cable and the number of drops.[4] Service is offered anywhere within the operating territories of each of the respondent carriers except that Southern Bell Telephone and Telegraph Company, General Telephone Company of California, and the United Companies of Arkansas, the Carolinas, Iowa, Missouri and Ohio, specify that CATV channel service will be provided within their local exchange areas. However, in no instance is the CATV distribution system interconnected with any telephone exchange facility or any telephone toll service facility.

6. On October 12, 1966, the Commission instituted an investigation in Docket No. 16928 into the lawfulness of the tariffs filed by General Telephone Company of California.[5] Like action was taken with respect to tariffs

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[2] Bell, upon request, will provide headend equipment but not all carriers do so. Some General tariffs offer headend equipment but the record does not disclose that such equipment has been provided in any of the distribution systems constructed by General to date.

[3] General Telephone Company of California uses somewhat different terminology in its tariff. Thus, it refers to "Wide Spectrum Services" which are offered in two categories, "Point-to-Point Service" and "Distribution Service." The charge for Point-to-Point Service is based on mileage and the charge for Distribution Service varies according to the number of service terminations at premises of CATV subscribers.

[4] Revised tariffs were filed by United on March 21, 1968, but these have not been considered in this proceeding.

[5] *California Water and Telephone Co.*, 5 FCC 2d 229, released October 13, 1966. At that time the carrier was California Water and Telephone Company. However, this corporation was subsequently merged with General Telephone Company of California and the latter was substituted as a party to this proceeding. FCC 67-1149, released October 23, 1967.

filed by operating subsidiaries of Bell in Docket No. 16943, on October 20, 1966;[6] and the operating subsidiaries of General and United in Docket No. 17098 on January 11, 1967.[7] In the latter two proceedings the Commission found that, in addition to the questions of lawfulness raised in Docket No. 16928, the tariffs raised questions as to the applicability of Section 214 of the Communications Act, and Part 63 of the Rules. In the Docket No. 17098 proceeding, inquiry was also directed into the extent of the Commission's jurisdiction over pole line attachment arrangements with CATV operators and, if it exists, how it should be exercised. The issues in Docket No. 16928 were broadened accordingly, and the three proceedings were consolidated for hearing.[8]

7. In view of the representations contained in a letter dated March 13, 1967, from subsidiaries of General, the Commission reviewed the status of the consolidated proceedings. It concluded that the proceedings involved adjudication within the meaning of Section 2(d) of the Administrative Procedure Act (5 USC 551) insofar as the issues concerning the applicability of Section 214 are concerned since, if applicable, the Commission proposed to take remedial action, including the issuance of cease and desist orders, against individual carriers on the basis of the evidence adduced. For this reason the Section 214 issues were deleted from the consolidated proceedings in Docket Nos. 16928, 16943, and 17098; and a separate adjudicatory proceeding in Docket No. 17333 was initiated for the purpose of hearing and determining the Section 214 issues.[9] In Docket No. 17333, the Commission designated

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[6] *The Associated Bell System Companies,* 5 FCC 2d 357, released October 21, 1966.

[7] *The General Telephone System, et al.,* 6 FCC 2d 434, released January 24, 1967.

[8] 6 FCC 2d 440 and 441, both adopted January 11, 1967, and released January 24, 1967.

[9] 7 FCC 2d 571 and 7 FCC 2d 575, both adopted March 29, 1967, and released April 3, 1967.

issues for hearing, and these are the only issues presently before us for consideration, as follows:

(a) Whether (with respect to the Bell System Companies) the requirements of Section 214 of the Act and Part 63 of our Rules implementing that section have been met as to the facilities used to offer channel service under the aforesaid tariffs and, if not, what action, if any, the Commission should take with respect thereto;

(b) Whether (with respect to the non-Bell System Companies) any of the respondents are subject to the requirements of Section 214 of the Act and Part 63 of our Rules implementing that section and, if so, whether these requirements have been met as to the facilities used to offer CATV channel service under the aforesaid tariffs and what action, if any, the Commission should take with respect thereto.

8. The Commission also called attention to the fact that the legal issues which had been designated included questions concerning the applicability of the exception in Section 214(a) for "local, branch, or terminal lines not exceeding 10 miles in length" and whether carriers claiming to be "connecting carriers" under Section 2(b)(2) of the Act are subject to the certificate requirements of Section 214 by virtue of furnishing channels of communication to CATV systems. In addition, all parties were placed on notice that, since these legal questions are under review, "any further construction or extensions of lines may be the subject of appropriate remedial action in this proceeding, including the issuance of cease and desist orders tailored to the particular factual situation." Due and timely execution of the Commission's functions was found to imperatively and unavoidably require that upon completion of the evidence, the Hearing Examiner not prepare a recommended decision but that he certify the record to the Commission for decision pursuant to Section 409(a) of the Act.

9. Prehearing conferences were held before Hearing Examiner Charles J. Frederick on April 24, 1967, and an oral argument on Storer Broadcasting's petition to intervene was held on May 11, 1967. The hearing commenced May 31, 1967, and hearings were subsequently held on June 1, 2, 5-9, 19, and 20, 1967. On July 11, 1967, a hearing conference was held to establish the procedure to be followed by reason of the Commission's Memorandum Opinion and Order (Docket No. 16931), FCC 67-745, released June 27, 1967, which authorized Warrensburg Cable, Inc. to introduce evidence on its complaint against United Telephone Company of Missouri in the Docket No. 17333 proceeding. The evidence was introduced through a stipulation which was made a part of the record on July 27, 1967. By Order, FCC 67M-1301, released August 1, 1967, the Hearing Examiner closed the record and by Order, FCC 67M-1421, released August 24, 1967, he certified the record to the Commission.[10]

10. Proposed findings of fact and conclusions of law and briefs in support thereof were filed on October 2, 1967, by each of the carriers, Bell, General, and United; by National Cable Television Association, Inc. (NCTA); jointly by Teleprompter Corporation, Manhattan Cable TV Service, Illinois-Indiana Cable Television Association, Michigan Cable Television Association, and West Virginia Community Television Association; jointly by New York State CATV Association and Community TV Association of New England; jointly by Pennsylvania Community Antenna Television Association, Inc., Ohio Cable Television Association, Inc., Texas CATV Association, Inc., and the Pacific Northwest Community TV Association, Inc.; by Warrensburg Cable, Inc.; by Storer Broadcasting Company; and by the Common Carrier Bureau. Briefs were also filed by the National Association of Regulatory Utility

[10] A motion to correct the transcript of hearing was filed by NCTA on September 5, 1967. No opposition to the motion has been received and it will be granted.

Commissioners (NARUC) and by the City of New York. A statement was filed by the CATV Task Force subscribing to the views of the Common Carrier Bureau. Reply briefs were filed on December 11, 1967. We heard oral argument, *en banc*, on February 26, 1968.[11]

The Applicability of Section 214

11. The legal issue presented in this proceeding is whether a certificate of public necessity and convenience pursuant to Section 214(a) of the Communications Act must be obtained by a telephone company before undertaking the construction of distribution facilities to provide channel service to a CATV ssytem. Section 214(a) provides:

> (a) No carrier shall undertake the construction of a new line or an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line

[11] Motions to correct the transcript of oral argument were filed by the CATV Task Force on March 4, 1968; by the Common Carrier Bureau on March 5, 1968; by United on March 8, 1968; by General on March 12, 1968; and by Bell on March 13, 1968. A motion was filed by Bell to strike certain comments of counsel for the CATV Task Force concerning an offer of proof at the hearing by counsel for the City of New York. The motion to strike will be denied since the comments have no decisional significance. The motions to correct the transcript of oral argument will be granted.

acquired under section 221 or 222 of this Act: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

By the arguments advanced on behalf of the several parties to this proceeding pertaining to the designated issues questions have been raised as to : (1) whether the channel service offerings relate to common carrier communications service undertakings; (2) whether the intelligence transmitted or to be transmitted by the telephone companies are interstate communications subject to the Commission's jurisdiction; (3) whether the construction under consideration, which does not cross a state boundary, is purely an intrastate line and therefore exempt under Section 214 (a)(1) from the certificate requirements or is part of an

interstate line; (4) even if a part of an interstate line, whether the construction relates to facilities which are "local, branch, or terminal lines not exceeding ten miles in length" and therefore exempt pursuant to Section 214 (a)(2) of the Act; and (5) whether the service offered in each of the several tariffs is a "telephone exchange service" within the contemplation of Section 221(b) of the Act and therefore not subject to Commission jurisdiction. On behalf of those carriers which heretofore have been classified as "connecting carriers" pursuant to the provisions of Section 2(b)(2) of the Act, the contention is advanced that Section 214(a) is inapplicable to them even if determined to be applicable to the "'fully subject" carriers.[12]

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[12] The ten operating telephone company respondents which claim to be "connecting carriers" are the following: General Telephone Company of Pennsylvania; General Telephone Company of California; United Telephone Company of Pennsylvania; United Telephone Company of Missouri; United Telephone Company of Ohio; United Telephone Company of Kansas, Inc.; Columbia-United Telephone Company; United Telephone Company of Arkansas; United Telephone Company of Iowa; and United Telephone Company of the Carolinas.

The eighteen "fully subject" Bell operating company respondents are as follows: The Chesapeake and Potomac Telephone Company of Virginia; The Chesapeake and Potomac Telephone Company of West Virginia; The Cincinnati and Suburban Bell Telephone Company; The Diamond State Telephone Company; Illinois Bell Telephone Company; Indiana Bell Telephone Company; Michigan Bell Telephone Company; The Mountain States Telephone and Telegraph Company; New England Telephone and Telegraph Company; New York Telephone Company; Northwestern Bell Telephone Company; Ohio Bell Telephone Company; Pacific Northwest Bell Telephone Company; Pacific Telephone and Telegraph Company; Southern Bell Telephone and Telegraph Company; Southern New England Telephone Company; Southwestern Bell Telephone Company; and Wisconsin Telephone Company.

The six non-Bell "fully subject" operating company respondents are: General Telephone Company of Indiana, Inc.; General Telephone Company of Michigan; General Telephone Company of Ohio; General Telephone Company of the Southwest; United Telephone Company of the Northwest; and United Inter-Mountain Telephone Company.

12. In *Common Carrier Tariffs for CATV Systems,* 4 FCC 2d 257, 260 (1966), we held that the furnishing by telephone companies of channels of communications to CATV operators "is clearly a common carrier undertaking." The carriers have not questioned that holding and for the purpose of deciding the applicability of Section 214, we find no reason to depart from that determination.[13] The situation with respect to the CATV operator whom we have held not to be a common carrier is distinguishable. As we pointed out in *Frontier Broadcasting Co.,* 24 FCC 251 (1958), the specific signals received by and distributed on the CATV system are determined by the CATV operator and "No individual subscriber has the option nor may he compel the CATV system to receive and deliver a particular signal at a given time; . . . ." The telephone company, however, makes no determination as to the television stations to be carried on the CATV system, but merely furnishes the channels of communication to the CATV operator who makes the selection as to the signals to be transmitted over the facilities. Since the telephone companies hold out the channel service for hire, invite all existing and prospective CATV operators to use the facilities, and have indicated a willingness and an ability to carry out this hire, the channel service offerings constitute a common carrier service. *United States* v. *California,* 297 US 175, 182 (1936); *United States* v. *Smith,* 215 F 2d 217 (CA6), 1954).

13. CATV channel service offerings of the carriers unquestionably are intended to provide an interstate communications service. The interstate nature of the communication is the basis for our assertion of jurisdiction

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[13] The CATV parties maintain that Section 214 is applicable to the said construction and consequently a contention that the construction does not relate to common carrier offerings would be inconsistent with the position taken in their briefs and at oral argument in this proceeding.

over nonmicrowave CATV systems, and the subject is fully developed in our orders asserting such jurisdiction. See *CATV*, 2 FCC 2d 725, 728-734, 793-797 (1966); *CATV*, 6 FCC 2d 309, 310-312 (1967). Further, our authority to regulate CATV systems has been upheld by the Supreme Court of the United States. *United States et al.* v. *Southwestern Cable Co., et al.*, Case Nos. 363 and 428, October Term, 1967, decided June 10, 1968 (36 US Law Week 4553). Therein, the Court stated: "Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates (footnote omitted)."[14] The carriers contend, however, that the CATV situation is distinguishable since the signals are processed at the CATV headend in preparation for their transmission over the cable, that the television broadcast is terminated and its identity is lost at the headend, that there is thus created a break in the original transmission and, consequently, that there is no through communication from the broadcaster to the cable of the telephone company. Since the input and output points of the telephone company's cable facilities for each CATV system are located within the confines of one state,[15] the carriers assert that the transmission is purely intrastate. The processing is no different from that which takes place in connection with the transmission by microwave and wire of any live coast-to-coast broadcast, and we

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[14] See also, *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, — US App DC —, 387 F 2d 220 (1967), where the Court held that CATV facilities are "a link in the interstate transportation of television signals" and that the system is engaged in interstate commerce.

[15] In only one instance do the cable facilities cross a state boundary. United Telephone Company of the Northwest provides channel distribution services in Hood River, Oregon, and in White Salmon and Bingen, Washington. All three communities are served from one headend.

find the contention to be without merit. The controlling facts here are that the cable facilities furnished by the telephone companies are links in the continuous transmission of the signals from the point of origin to the set of the viewer, and the intelligence received by the viewer is essentially the same as that transmitted by the broadcaster. Irrespective of the location of its physical facilities, the common carrier which thus participates as a link in the relay of television signals is performing an interstate communications service. *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 122 US App. DC 253, 352 F 2d 729 (1965); *Ward* v. *Northern Ohio Telephone Co.*, 300 F 2d 816 (CA 6, 1962), *cert. denied*, 371 US 820; *Pacific Telatronics, Inc.* 37 FCC 1163 (1964).[16]

14. On behalf of the carriers, it is urged that judicial decisions upholding Commission action taken pursuant to Title III of the Act are inapposite since the Commission's common carrier jurisdiction under Title II, which is involved in this proceeding, is not co-extensive with its licensing powers under Title III. The carriers also claim that, assuming the Commission properly asserted jurisdiction over CATV systems and over the services and charges of the carriers to CATV systems, it does not follow that the lines used to provide such services are subject to the

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[16] The principles enunciated in the cited cases also dispose of the carriers' assertion that the cable service provided to CATV systems is not "incidental to radio communication of any kind" within the meaning of Section 202(b) and therefore is not subject to the Commission's common carrier jurisdiction under Title II of the Act. For like reasons we must reject the carriers' argument that by reason of the definition of "radio communication" in Section 3(b) of the Act, Section 202(b) applies only to radio transmission and that the CATV system operates only on a completed transmission. The arguments completely ignore the fact that the common carrier cable facilities are utilized for the purpose of delivering the radio communication and are consequently within the contemplation of Sections 3(b) and 202(b).

certification requirements of Section 214, because the said Section does not apply to "services" but to the "facilities" used to provide such services. It may be, as claimed, that our prior determinations and the authorities relied upon are not dispositive of the issues now before us. Nevertheless, such issues must be resolved on the basis of the statutory scheme of the Act as a whole, and in a manner which will achieve the overall objectives of the Act. See *Carter Mountain Transmission Corporation* v. *Federal Communications Commission*, 116 US App DC 93, 321 F 2d 359 (1963), *cert. denied* 375 US 951; *Conley Electronics Corporation, d/b/a Teleprompter of Liberal, Inc.* v. *Federal Communications Commission, et al.*, 12 RR 2d 2108 (CA 10, decided April 22, 1968).

15. Section 2(a) makes the provisions of the Act applicable "to all interstate and foreign communication by wire or radio . . .," By Section 202(b), in the context of the Act, the Commission has been given regulatory jurisdiction over "services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, . . . incidental to radio communications of any kind." *Ward* v. *Northern Ohio Telephone Co., supra.* Section 301 specifies that the purpose of the Act is "to maintain the control of the United States over all the channels of interstate and foreign radio transmission; . . . ." And the Courts have recognized that the Act confers comprehensive regulatory power on the Commission. *United States et al.* v. *Southwestern Cable Co. et al., supra; National Broadcasting Co.* v. *United States*, 319 US 190, 219 (1943); *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 US 134, 138 (1940).

As for Section 214, "The standard of 'public convenience and necessity' is to be so construed as to secure for the public the broad aims of the Communications Act." *Western Union Division* v. *United States*, 87 F. Supp. 324, 335 (USDC, D of C, 1949), *affirmed* 338 US 864. It is in the light of the foregoing principles that we must con-

sider whether certification is a prerequisite to the construction by a common carrier of facilities to provide CATV channel service.

16. Manifestly, Congress intended by Section 214 to confer upon the Commission broad supervisory control over construction by communications common carriers in order to insure that such construction would not be inconsistent with the public interest; *e.g.*, not wasteful or unnecessary. *Mackay Radio and Telegraph Company*, 6 FCC 562 (1938). As the Supreme Court stated in construing and applying comparable language in the Interstate Commerce Act[17] ". . . the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public . . . ." Since Section 214 requires certification as a prerequisite to the construction of "any line" and defines a line as "any channel of communication established by the use of appropriate equipment" with one exception not here pertinent, it would appear under the plain language of the Section that CATV channel service provided by the telephone companies is encompassed within its provisions. The carriers, however, insist that the said channel facilities come within the exemptions specified in Section 214, and that certification is not necessary. In disposing of this contention, we must take into account the remedial nature of the legislation and that exemptions from the sweep thereof should be given a limited or narrow interpretation in order to effect the remedy intended. See *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission, et al.*, 286 US 299, 311-312 (1932); *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Northern Pac. R. Co.*, 120 F Supp 710, 712 (DC Wash.), *affirmed* 225 F 2d 840 (CA 9, 1955).

17. Premising their argument first on the Section 214-(a)(1) exemption concerning a "line within a single State

[17] *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 US 266, 277 (1926).

unless such line constitutes part of an interstate line," the carriers assert that the interstate line contemplated by the Section is an interstate "common carrier" line and that Section 214 is inapplicable unless the facilities of the common carrier cross a state boundary. Pointing out that with the one exception heretofore mentioned, the cable facilities furnished by the carriers to each of the CATV systems are located within the confines of a single state, they contend that only intrastate lines are involved. Further, relying on *Pennsylvania Railroad Co.* v. *Public Utilities Commission of Ohio,* 298 US 170 (1936), the carriers contend that the non-common carrier facilities of neither the broadcaster nor the CATV operator[18] may be combined with the common carrier facilities of the telephone company to bring a line under certificate requirements as an interstate line. Since no physical facilities of a common carrier cross a state boundary, the carriers state that the CATV channel service is purely an intrastate line and therefore within the contemplation of the Section 214(a)(1) exemption.

18. The position taken by the carriers is untenable. In the first place, they disregard completely the fact that the term "line" is defined in Section 214 as "*any channel of communication established by the use of appropriate equipment,* other than a channel of communication established by the interconnection or two or more existing channels" (emphasis supplied). Neither the wording of this definition nor anything in the legislative history of Section 214 indicates a Congressional intent to limit the certification requirements thereof to cases where the physical facilities of the common carrier cross a state boundary. On the contrary, we believe that the definition of a line manifests a primary Congressional concern over the channel of communication, rather than merely over the wires and cables, i.e., the equipment, used to establish the

[18] Admittedly, neither is a common carrier. *Frontier Broadcasting Co.,* 24 FCC 251 (1958); Section 3(h) of the Act.

channel.[19] Our view is reinforced by the fact that Section 214 is not confined to the "extension" of a line—which might reasonably be construed as requiring some part of the common carrier facilities to cross a state boundary—but includes the "construction of a new line" even though wholly within a single State so long as it is part of an interstate "channel of communication" or "line." *Southwestern Bell Telephone Company*, 6 FCC 529, 532 (1938). The broadcaster's signal is an interstate channel of communication and the CATV channel distribution system which is a link in the transmission of the signal to the television set of the viewer is a part of that interstate channel. Significantly, the telephone companies have been unable to point to anything in the statutory scheme of the Communications Act which would justify limiting the phrase "channel of communication" to a common carrier channel. Therefore, unless *Pennsylvania Railroad* requires a contrary conclusion, the Section 214(a)(1) exemption has no application here.

19. The case cited above, upon which the carriers rely, is clearly distinguishable. In that case, the transportation across a state boundary was performed by the owner of the product transported who was not subject to the Interstate Commerce Act, and the only movement by a common carrier was purely intrastate. The Court held that the Interstate Commerce Act "is aimed at common car-

[19] The definition of a line distinguishes *New York Dock Ry.* v. *Pennsylvania R. Co.*, 62 F (2d) 1010 (CA 3, 1933) *cert. denied*, 289 US 750, upon which the carriers rely. In that case, the Court held that as used in the Interstate Commerce Act, the word "line" meant the company's "road, yards, tracks" or the "thing itself" (p. 1013). However, the Court expressly held that if the word "transportation" had been used, a different result would have been reached. As used in the Communications Act, however, the word "line" is not confined to the "thing itself" or the "equipment" but extends to that for which the equipment is used and is comparable to the "transportation" to which the Court referred in *New York Dock Ry.*

riers exclusively . . . and not even at all these" (298 US at 174-175); and that the statute forbids the "unifying process" of tacking on to the interstate transportation by the owner of the product, the intrastate transportation of the common carrier in order to make the movement interstate within the contemplation of that Act, and thus subject the whole carriage to the operation of the statute "when the parts would be exempt" (298 US at 176). However, the intrastate as well as the interstate transmission of television signals is subject to federal regulation and this is so whether carriage of the signals is performed by a common carrier or a non-common carrier. Consequently, combining the interstate transmission of the broadcaster and the CATV operator with the intrastate carriage by the common carriers does not bring within the contemplation of the Communications Act conduct which would otherwise be exempt; but constitutes an exercise by the Commission of the jurisdiction which has been conferred by the Act over all links in the chain of transmission from the broadcaster to the viewer.[20]

20. In our view, neither the provisions of the Act nor any judicial precedent called to our attention support the carriers' contention that the "interstate line," i.e., the interstate channel of communication, referred to in Section 214, is limited to interstate common carrier lines; and we are persuaded that Congress intended no such limitation. On the contrary, we conclude that cable facilities furnished by a telephone company for the purpose of transmitting television signals from the CATV tower or headend to the premises of the CATV subscribers is part

[20] In this connection, we note that the Court distinguished *United States* v. *Erie Railroad Co.*, 280 US 98 (1928), where the Interstate Commerce Commission was held to have jurisdiction over the rates for a wholly intrastate carriage by a railroad of goods shipped from abroad on the ground that the intrastate transportation was a part of "foreign commerce," and jurisdiction over intrastate transportation under such circumstances had been conferred upon the agency by the statute.

of an interstate channel of communication and consequently is not exempt from the certificate requirements of Section 214 by reason of the provisions of subdivision (a)(1).

21. The carriers further contend that even if not excused from the certification requirements by reason of Section 214(a)(1), the CATV channel service facilities come within the exemption of Section 214(a)(2) as "local, branch, or terminal lines not exceeding ten miles in length, ..." This contention must likewise be rejected. While the legislative history sheds little light on the subject, we believe that the purpose and intent of Section 214 would be defeated by adoption of the interpretation urged upon us by the carriers. Essentially, the exemption is intended to apply to minor additions or improvements to existing facilities or services and the expenditure involved is ordinarily small. Thus, the building of a branch office, or construction to improve the facilities of existing customers or to supply existing services to others who, being within the same territory and similarly situated, are entitled to like service from the carriers, need not be certificated; but such are the types of situations to which the Section 214(a)(2) exemption must be limited. See *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 US 266 at 278; Sections 63.01-6303 of the Rules.

22. The construction under consideration in this proceeding, however, involves far more than a minor addition for the improvement or "filling in" of existing services. The channel facilities necessitated a considerable amount of new construction by the telephone companies in order to provide new customers with a type of service significantly different from that theretofore provided in the said communities. Furthermore, substantial outlays of funds were required in order to furnish the CATV channel service. Thus, Indiana Bell expended approximately $900,000 to provide Marion Cable Television, Inc. of Marion, Indiana, with 41.6 miles of feeder and 131.4 miles of distribution cable together with the necessary drops. Southwestern

Bell has furnished See TV Company of Mexico, Missouri, with 15 miles of feeder and 46.4 miles of distribution cable, and the drops at the premises of subscribers, which represented an investment of approximately $300,000. The cable distribution system installed by General Telephone Company of Ohio for Marion CATV, Inc., at Marion, Ohio, consisting of 40.42 miles of feeder and 98.36 miles of distribution cable and the drops cost about $497,000. United Telephone Company of Ohio provided Multi-Channel TV Cable Company of Mansfield, Ohio, with 29.12 miles of feeder cable and 106.27 miles of distribution cable at an approximate cost of $343,220. Other channel distribution systems are smaller and represent less investment by the telephone companies but the fact remains that the total investment by the carriers amounts to millions of dollars. Although each cable distribution system furnishes service only to a local CATV system, such construction does not, in our view, relate to the "local, branch, or terminal lines" contemplated by the Section 214(a)(2) exemption, but relates, instead, to "main" communication lines which should have been certificated.[21]

23. Little discussion is necessary to dispose of the carriers' further contention that channel distribution service for CATV systems must be considered as a telephone exchange service exempt from Commission regulation by Section 221(b) of the Act.[22] By Section 3(r) of the Act,

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[21] In view of our determination, we do not reach, and it is unnecessary to discuss, the question of whether the facilities are more than ten miles in length.

[22] Section 221(b) provides as follows: "Sec. 221. (a) . . . (b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority."

a "telephone exchange service" is defined as: ". . . service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange and which is covered by the exchange service charge."

24. The construction attributed by the carriers to the phrase "telephone exchange service" must be rejected as inconsistent with the plain meaning of the words used. Manifestly, the phrase is intended primarily to apply to a telephone or comparable service involving "intercommunication," i.e., a two-way communication, not the one-way transmission of signals which takes place with respect to CATV channel service. Furthermore such channel service does not require an exchange,[23] does not go through an exchange, and is totally unrelated to the "exchange service charge." For like reasons, the carriers' assertion that "intercommunicating service" defines the area within which a service may be regarded as telephone service must also be rejected. The words are not used in connection with area but with reference to the "character" of the service "ordinarily furnished by a single exchange . . ." Since Section 221(b) is not even remotely applicable to the construction of lines for CATV channel distribution service, we need not concern ourselves with the extent of any local government regulation of telephone exchange services.

25. We conclude on the basis of the foregoing that Section 214 of the Act is applicable to the construction of channel distribution systems for CATV operations, and compliance with the certification provisions thereof is required at least by the "fully subject" carriers. The next

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[23] According to Webster's New World Dictionary, one of the definitions of an "exchange" is "a central office, or a system operated by it, providing telephone communication in a community or in part of a city." CATV service is not operated by or through a central office.

question to be resolved is whether Section 214 is applicable to those carriers which heretofore have been classified as "connecting carriers" pursuant to Section 2(b)(2) of the Act which provides in pertinent part as follows:

> (b) Subject to the provisions of Section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . . (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, ..."

26. We find no basis in the Act for any exemption from the certificate requirements of Section 214 on behalf of connecting carriers. The connecting carrier which furnishes channel service to a CATV system is engaged in interstate communication because, just as in the case of the fully subject carrier, it acts as a link in the interstate transmission of television signals from the broadcaster to the viewer (*supra*, par. 18), and not "solely" by reason of any interconnection with another common carrier. To hold otherwise would accord the connecting carrier a preferred status merely because, with respect to other unrelated common carrier activities, the provisions of Section 214 are not applicable.

27. The decisive factor in determining the applicability of Section 214 is the character of the communication for which the construction is undertaken, rather than the classification of the carrier as a connecting carrier. Thus, in *Ward* v. *Northern Ohio Telephone Co.*, 300 F 2d 816 (CA 6, 1962), *cert. denied*, 371 US 820, the Court held that a telephone company which had been classified as a connecting carrier is engaged in interstate communication, and is in interstate commerce, "in so far as the furnishing, or the obligation to furnish wires for broadcast purposes" is

concerned. No significant distinction exists between wire service to a broadcast station and wire service to a CATV since both are, as heretofore stated, links in the interstate transmission of television signals and are "incidental to radio communication." We therefore hold that the construction of lines for the purpose of providing channel service either to a broadcast station or to a CATV system must be certificated pursuant to the provisions of Section 214. To the extent that *Capital City Telephone Co.*, 3 FCC 189 (1936), upon which the connecting carriers rely, is inconsistent with our present holding, it is overruled.

28. In addition to making application for certificates of public convenience and necessity under Section 214, the connecting carriers must also comply with the tariff and other provisions of the Act to the same extent as the fully subject carriers with respect to channel services provided to broadcasting stations and to CATV systems. We wish to make clear, however, that the carriers' status as connecting carriers with respect to those interstate activities resulting "solely through physical connection with the facilities of another carrier," are not intended to be affected, and are not affected, by our determination here.

29. None of the respondent carriers has filed applications pursuant to Section 214 of the Act and Part 63 of the Rules for authority to construct or operate facilities used to provide CATV channel service. We shall direct, therefore, that each of the respondent carriers in this proceeding file within twenty days after the release of this decision applications for certification of any and all such facilities which heretofore have been constructed; that work on any construction in process be discontinued; and that no further construction of CATV channel distribution facilities be undertaken until application for Section 214 certification has been filed and Commission authorization for such construction has issued. In addition, we deem it essential to take remedial action herein which will dissipate, to the extent possible, the adverse effects upon the public of the unlawful conduct of the carriers.

30. Under Section 214(c) of the Act, the Commission is authorized to institute judicial proceedings for an injunction against the unlawful construction of common carrier facilities and against the operation by the carriers of facilities constructed without the required certification.[24] Despite the contention of the telephone companies that an injunction is the only remedy available for a violation of Section 214 we do not believe that we are so limited. Section 312(b) of the Act expressly provides that the Commission may order any person who "has violated or failed to observe any of the provisions of this Act," or "any rule or regulation of the Commission" to cease and desist from such action. The evidence of record establishes that Bell, General, and United have constructed facilities for the purpose of providing channel service to CATV systems in numerous communities throughout the United States without applying for or receiving Section 214 certification; that they are operating such facilities in violation of the Rules; and that the construction of additional facilities in violation of the Act and the rules is continuing at a rapid rate. From the record it also appears that in some communities CATV channel service is being provided from more than one source. Whether there is involved wasteful duplication of facilities by a common carrier we need not now determine since that is a matter for consideration in connection with the Section 214 certification. However, in these circumstances we not only have the authority, but we have the obligation in the public interest to bring to an end as expeditiously as possible the widespread violations of the Act and the rules by the telephone company respondents.

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[24] In pertinent part, Section 214(c) provides: "Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State Commission, any State affected, or any party in interest."

31. Cease and desist orders are called for in this proceeding and we shall issue such orders which, as we indicated when we designated this adjudicatory proceeding for hearing, will be "tailored to the particular factual situation" (7 FCC 2d at 576). There are a number of pertinent factors to be taken into account in fashioning the cease and desist orders in each case. Thus, the considerations which govern the disposition to be made of proceedings involving the connecting carriers differ from those which apply to the fully subject carriers (see par. 41, *infra*). The date when the carrier first was placed on notice that a question existed as to the applicability of Section 214 to construction for CATV channel service is particularly significant. In our order released October 21, 1966 (5 FCC 2d 357), we included a Section 214 issue. At least insofar as the fully subject carriers are concerned, we find that any construction to provide channel service to CATV systems after that date was undertaken with knowledge of its possible unlawfulness. Consequently, the carriers assumed the risk that such construction might be the subject of remedial action by the Commission. Other circumstances, such as the filing of a formal complaint by a CATV operator or prospective operator challenging the lawfulness of such construction in a specific community, may make advisable the use of an earlier date. However, whether October 21, 1966, or some other date is used as the base date, continued operation of common carrier distribution facilities which thereafter first became operational may be permitted in situations where the facilities were substantially completed on or before the base date.[25]

32. A factor militating against relief of a common carrier from the cease and desist order to be entered herein

[25] By substantially completed, we mean those facilities where the cost of equipment actually installed, together with the cost of installation, constitutes 50 percent or more of the total expended for equipment and labor initially to put the CATV channel distribution system into operation.

is the existence of an affiliation between the CATV operator and the telephone company serving the particular community, such as a parent-subsidiary relationship or where both are under common control. By reason of its control over utility poles, or other local advantages resulting from its status as an existing common carrier in the community, the telephone company is in a position to preclude or to substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition. Furthermore, construction by a telephone company for an affiliated CATV operator calls for careful scrutiny on the part of the Commission in order to insure against wasteful duplication or unnecessary construction. Where such an affiliation exists, therefore, it is doubtful that any sufficient equitable basis exists for according permanent relief to the carrier, and we would be inclined to deny such relief absent a showing of specially meritorious circumstances requiring a contrary conclusion in the public interest. Other factors to be weighed in these cases and other considerations relating to the connecting carriers will be discussed in greater detail below in fashioning the particular orders to be entered in individual cases.

33. As of October 21, 1966, Bell companies had completed construction of channel distribution facilities which were in operation and providing service to 34 CATV operators whose systems furnish CATV service to subscribers in approximately 40 communities. In no case is the CATV operator a subsidiary or affiliate of Bell. Attached hereto as an Appendix is a list of the common carrier CATV distribution facilities which were in operation on or before October 21, 1966. With respect to these facilities we shall require that applications for certification pursuant to Section 214 of the Act and Part 63 of the Rules be filed within 20 days after the release of this decision. If an application is timely filed, the carrier serving each of the CATV systems enumerated in the Appendix is authorized to continue operation of its channel facilities pending Commission ac-

tion on the application, and is exempt from the cease and desist order issued herein.

34. With respect to each of the remaining facilities where a Bell operating company commenced furnishing service after October 21, 1966, and on or before the release of this decision, the carrier must cease and desist from the operation thereof, with the exceptions hereafter to be discussed, within 30 days after the release of this decision, and to desist from further operation until Section 214 certification applications are filed and approval for the said construction is received from the Commission. The exceptions to be permitted relate to those systems where 50 percent or more of the total cost of equipment installed and the cost of installation was expended by October 21, 1966, or prior to the time that the lawfulness of the carrier's construction of CATV channel facilities in a particular community was challenged. On October 11, 1966, International Cable T.V. Corporation filed a complaint against the furnishing of CATV channel service pursuant to the proposed tariff of The Pacific Telephone and Telegraph Company insofar as service was contemplated to a CATV system at Altadena, California. The record in this proceeding discloses that CATV channel service to All-Metal Fabricators, Inc. at Altadena commenced on February 20, 1967. In this instance, we shall use October 11, 1966, as the date on which the 50 percent completion test heretofore described must be met. Therefore, Pacific Telephone must cease and desist from further operation of the Altadena CATV channel service within 30 days after the release of this decision unless within 20 days after the said release date, the carrier files a Section 214 certification application and in addition shows by an appropriate pleading supported by affidavits and other factual information that as of October 11, 1966, it had expended for equipment actually installed and for the installation thereof at least 50 percent of the total amount expended by February 20, 1967. With respect to all other Bell operating companies which commenced op-

eration of CATV channel distribution systems after October 21, 1966, and on or before the release date of this decision, the controlling date for the application of the 50 percent test is October 21, 1966.[26] In each instance, upon the filing within 20 days after the release date of this decision of required certification applications and an appropriate showing that 50 percent or more of the total cost had been expended by that date, the carrier will be authorized to continue the operation of its CATV channel service pending further order of the Commission. Further, where service commenced between the base date and the release date of this decision, and the 50 percent exception is inapplicable, the carrier may continue furnishing channel service to the CATV system pending further order of the Commission provided that within 20 days after the release date of this decision a certification application is submitted and there is filed a pleading, substantiated by affidavits and other supporting factual data, showing that the existing CATV operator is the only one holding a franchise authorizing such operation, that at the time service was commenced no other application for channel service or for a pole line attachment or other like application was pending before the carrier, and that the cease and desist order will result in the complete deprivation of CATV service to the subscribers in the community; or any other public interest factors which warrant relief from the cease and desist order. Responsive pleadings in each case may be filed within ten days, but no replies to such responses will be entertained.

35. As for any channel service facilities of a Bell operating company which had not commenced operation on or before this decision's release date, the carrier shall cease and desist from any further construction immediately. Within 20 days after the said release date, certification applications shall be filed for all CATV channel service facili-

[26] We consider the complaint filed on October 13, 1966, by NCTA against several Bell operating companies as being too general in nature to warrant use of the earlier date against such companies.

ties heretofore completed. No further construction on uncompleted facilities and no construction of new facilities to furnish channel service to CATV systems shall be undertaken until requests for certification have been filed and approved by the Commission.

36. In determining the nature of the cease and desist orders to be issued against the General and United operating companies, we shall treat first the fully subject carriers of each and thereafter the operating companies which claim exemption from the provisions of Section 214 as connecting carriers. The facilities of General for the furnishing of CATV channel service to which we shall now direct our attention are as follows:

Telephone Operating Co.	*CATV Systems*	*Communities Served*
General Telephone Co. of Ind.	GT&E Communications	Angola, Ind.
	Indiana Cable TV, Inc.	Terre Haute, Ind.
	GT&E Communications	Winchester, Ind.
General Telephone Co. of Mich.	Booth American Co.	Muskegon, Mich.
	GT&E Communications	South Haven, Mich.
General Telephone Co. of Ohio	Marion CATV, Inc.	Marion, Ohio
General Telephone Co. of the Southwest	GT&E Communications	Brownfield, Texas
	GT&E Communications	Levelland, Texas

37. Distribution service by General Telephone of Michigan, to Booth American Company at Muskegon, Michigan, commenced during March, 1966, and upon the filing of a Section 214 application within 20 days after the release of this decision, such service may be continued pending a determination by the Commission on the said application. Like action will be taken with respect to the channel service furnished by General Telephone of Ohio to Marion CATV, Inc. at Marion, Ohio, which commenced during October, 1966. Upon the timely filing of an application for certification, such service may be continued during the penedency of the matter before the Commission. During November, 1966, General Telephone of Indiana commenced furnishing channel service to Indiana Cable TV, Inc., at Terre Haute, Indiana, but a substantial amount of con-

struction may have been completed by October 21, 1966. In accordance with the procedure outlined in paragraph 34 above, service to Indiana Cable may be continued pending further order of the Commission upon the filing within the specified 20-day period of a Section 214 certification application and a properly supported pleading which indicates that the 50 percent test as of October 21, 1966, applies,[27] or that other public interest factors exist which justify exempting the carrier from the operation of the cease and desist order.

38. In Angola and Winchester, Indiana, South Haven, Michigan, and Brownfield and Levelland, Texas, operating companies of General are furnishing channel service to GT&E Communications, Inc. (GT&E), which is a wholly owned subsidiary of General. While some of the channel facilities were completed or substantially completed on or before October 21, 1966, a cease and desist order appears to be appropriate because of the relationship between the carrier and the CATV operator. As we have previously indicated, the operation of facilities in these circumstances will be authorized only where particularly meritorious circumstances are established where require such action in the public interest. Nevertheless, we shall permit the continued operation of these facilities pending further order of the Commission provided that within 20 days after the release of this decision application for certificates of public convenience and necessity are filed and a pleading substantiated by affidavits and other supporting factual data is submitted to show: (a) that no operator other than GT&E holds a franchise or is otherwise authorized to operate a CATV system in the community; (b) that at the time the distribution facilities were constructed and put into operation no application by a competing operator or prospective

[27] In view of the general nature of the complaint filed on October 14, 1966, by NCTA against the operating companies of General (Docket No. 16934), we do not believe that use of the earlier date is warranted.

operator either for channel service or for a pole line attachment arrangement or other like application was pending before the carrier; (c) that the enforcement of a cease and desist order would result in the complete deprivation of CATV service to the subscribers in the community; and (d) any other factors which warrant relief from the cease and desist order in the public interest. However, the operating telephone companies of General named in paragraph 36 will be required to cease and desist from the further construction of CATV channel distribution facilities and, except as specifically herein provided, to cease and desist from the operation of facilities heretofore constructed until a certificate pursuant to Section 214 of the Act and Part 63 of the Rules is applied for and approval is obtained. As to any construction heretofore undertaken, the application for certification must be filed within 20 days after the release of this decision. Responsive pleadings to those herein authorized may be filed within 10 days but no reply pleadings will be entertained.

39. Two fully subject operating companies of United provide channel distribution facilities to CATV systems. United Telephone Company of the Northwest commenced construction of such facilities for the CATV system serving Hood River, Oregon, and White Salmon and Bingen, Washington, on September 2, 1966, and they were completed on April 14, 1967. United Inter-Mountain Telephone Company provides CATV channel service in Abingdon and Gate City, Virginia, and in Greeneville, Kingsport, Sullivan Gardens, Church Hill, and Mount Carmel, Tennessee; at the time of the hearing it had definitive plans to furnish like service for CATV operations at Galax and Saltville, Virginia, and consideration was being given to providing service to CATV operations in other communities. The record contains no information concerning the date the distribution facilities constructed by Inter-Mountain first became operative. The record does establish, however, that the CATV operator in each community to which United of the North-

west and United Inter-Mountain provides channel service is United Transmission, Inc., a wholly owned subsidiary of United Utilties, Inc., the parent corporation of the operating telephone companies.

40. In view of the affiliation between the telephone company furnishing the channel service and the CATV operator, we are persuaded that a cease and desist order is necessary in the public interest and that relief from the operation thereof should be granted only upon a showing that countervailing public interest considerations justify such action. Therefore, except as hereafter provided, we shall direct that within 30 days after the release of this decision United Telephone Company of the Northwest and United Inter-Mountain Telephone Company cease and desist from further operation of each and every channel distribution system furnishing service to United Transmission which became operational on or before the release of this decision; and that the said telephone companies cease and desist from further construction of such facility until application is made for a certificate of public convenience and necessity and the certificate for that particular facility is issued. With respect to any construction heretofore undertaken, the certification application shall be filed within 20 days. However, we shall permit each of the channel distribution facilities completed and in operation on or before the release of this decision to continue in operation pending further order of the Commission provided a Section 214 application is filed within 20 days and a pleading substantiated by affidavits and other supporting factual data is filed within the said 20-day period containing the following showing:

(a) The date the distribution facilities for each CATV system in each community first became operational.

(b) The total cost of equipment and labor for each of the distribution facilities constructed.

(c) That no operator other than United Transmission holds a franchise or is otherwise authorized to operate a CATV system in the community.

(d) That prior to or at the time the distribution facilities were constructed, no application by a competing operator or prospective operator either for channel service or for a pole line attachment arrangement or other like application was pending before the carrier.

(e) That the enforcement of a cease and desist order would result in the complete deprivation of CATV service to the subscribers in the community.

(f) Any other public interest factors which are relevant and material to a determination as to whether relief from the cease and desist order is warranted.

Responsive pleadings may be filed within 10 days but no replies will be entertained.

41. Next we come to a consideration of the action to be taken in the situation where the distribution facilities were constructed by telephone companies which have been classified as connecting carriers pursuant to Section 2(b)(2) of the Act. In balancing the equities in favor of the carriers against the advisability of a cease and desist order in the public interest, we must give weight to the fact that connecting carriers, relying on our decision in *Capital City, supra,* had reason to believe that Section 214 was not applicable to their construction of lines for the purpose of furnishing channel service to CATV systems. Thus, there does not appear to be the flagrant violation of the Act and the rules committed by the fully subject carriers, and a "grandfathering" as of the date of release of this decision may be warranted. Nevertheless, any equities in favor of the connecting carriers may be counterbalanced by notice that a question existed as to the lawfulness of con-

struction in a specific community through the filing of a complaint directed at the particular construction or by other public interest considerations such as the existence of an affiliation between the carrier and the CATV operator.

42. Two operating companies of General with connecting carrier status provide CATV channel service, and they are respondents herein, namely: General Telephone Company of California (formerly California Water and Telephone Company) and General Telephone Company of Pennsylvania. General of California has furnished channel service to International Cable, an unaffiliated owner, for a CATV system at Hastings Ranch, California, since November, 1966, and at the time of the hearing in this proceeding it was in receipt of a firm order for channel service from the same operator for a system at Duarte, California. We do not believe that the general allegations contained in complaints filed during October, 1966, are sufficient to justify the denial of equitable relief to General of California with respect to facilities for an unaffiliated owner which were constructed and in operation on or before the release date of this decision. Provided applications for certification for such completed facilities are filed within 20 days, the continued operation thereof is authorized pending disposition of the applications. However, except as herein authorized, General of California will be required to cease and desist from further construction of distribution facilities, to submit within 20 days certification applications for construction previously undertaken, and to undertake no new construction until authorized by the Commission. Further, if channel service is being furnished to a CATV system by a subsidiary or affiliate of General or by the telephone company itself,[28] the carrier must cease and desist from the operation thereof within 30 days unless within 20 days an application pursuant to Section 214 is submitted and a

[28] From the record it appears that General of California provides CATV service directly to viewers in some areas.

pleading is filed specifying the operator of each CATV system, the community involved, and containing the other information outlined in paragraph 40(a) through (f). Responsive pleadings as therein authorized may be filed.

43. General of Pennsylvania has provided channel service to an unaffiliated CATV system, Laurel Cablevision, at Somerset, Pennsylvania, since December, 1966. As with the Hastings Ranch CATV system, the carrier will be required to file a certification application for the facilities within 20 days, and if filed, operation thereof may be continued pending disposition of the application. Channel service to a CATV system at Vandergrift, Pennsylvania, has been provided by General of Pennsylvania since April, 1966. In this case, however, the CATV operator is the affiliated company, GT&E Communications. With respect to the operation of the distribution facilities for this system, and for any other distribution service to an affiliated CATV operator, a cease and desist order will be issued subject to the conditions and the submission of the applications, pleadings and information outlined in paragraph 40. Under no circumstances shall new construction to provide channel service to a CATV system be commenced until a certificate of public convenience and necessity is issued by the Commission.

44. Of the eight respondent operating telephone companies of United which have been classified as connecting carriers,[29] no distribution facilities for CATV systems have been constructed by United of Arkansas, of Iowa, or of the Carolinas and consequently no consideration need be given to the issuance of cease and desist orders against those companies. United of Ohio has provided channel service for an undisclosed period of time to Sidney Cable TV Co., which is unaffiliated with United, for CATV operations at Sidney, Ohio. Consistent with the position taken in con-

[29] See footnote 12.

nection with other like operations, continued channel service to Sidney Cable will be authorized provided certification applications are filed within 20 days. Channel service for a CATV system in Mansfield, Ohio, was commenced by United of Ohio on June 28, 1965. However, the Mansfield system is presently operated by Multi-Channel TV Cable Company which is affiliated with United and with respect to this system a cease and desist order will be issued in accordance with the procedure and pursuant to the conditions outlined in paragraph 40; except that information concerning the time when service was commenced and the cost of equipment and labor, which was supplied at the hearing, need not be repeated.

45. All of the CATV distribution facilities constructed or proposed to be constructed by United of Pennsylvania,[30] Columbia-United, and United of Kansas are for the purpose of providing channel service to CATV systems owned by an affiliated company.[31] We shall therefore direct that each of the said carriers cease and desist from further construction of such facilities until Commission authorization is received, and that it cease and desist from the operation of any channel facilities heretofore constructed except to the extent authorized and subject to the procedure outlined in paragraph 40; and upon compliance with the prequisites therein specified, operation is authorized pending further order of the Commission.

46. United Telephone Company of Missouri has constructed lines to provide channel service to CATV systems located in a number of communities in the State of Mis-

[30] United Transmission is the operator of CATV systems serving Chambersburg, Fayetteville, Claysburg, Martinsburg, and Roaring Spring. At the time of the hearing, construction of channel facilities was planned to serve Hanover for Penn-Mar CATV, Inc., of which United Transmission owns 33⅓ percent of the capital stock.

[31] United Transmission is the only customer for CATV channel service for Columbia-United and United of Kansas.

souri;[32] and at the time of the hearing construction was contemplated to provide service to CATV systems in at least two additional communities.[33] In each case, the CATV operator or prospective operator is an affiliate of United.[34] Because of the special circumstances relating to Warrensburg, we shall discuss the CATV operations in that community first.

47. In Warrensburg, Missouri, CATV service is being provided by two CATV systems, each of which holds a nonexclusive franchise for its operation. One of the CATV operators is Warrensburg Cable, Inc. and the other is United Transmission, Inc., the wholly owned subsidiary of United. On October 12, 1966, Warrensburg Cable filed a formal complaint[35] charging that lines were being constructed by United of Missouri to provide CATV distribution service to United Transmission, that no certificate of public convenience and necessity pursuant to Section 214 of the Act had been obtained, that certification was required, and that therefore such construction was unlawful. At the time the complaint was filed, service to United Transmission had not been instituted but on November 7, 1966, the carrier commenced providing CATV service to United Transmission. In its complaint, Warrensburg Cable requested that the Commission direct the carrier to cease the construction of additional facilities or to use facilities previously constructed. In this case, United of Missouri had clear and definite notice at least as of the date the formal complaint was filed, that a question existed as

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[32] The communities where service had commenced are Lebanon, Warrensburg, Warsaw, Fairfax, and Tarkio.

[33] Windsor and Butler.

[34] The CATV operator at Lebanon is Le-Mo Cable Co., of which only 10 percent of the stock is not under United control. United Transmission is the operator of the remaining CATV systems.

[35] An informal complaint had been filed on August 15, 1966.

to the lawfulness of its construction to provide channel service in Warrensburg. Nevertheless, United persisted in the construction of such facilities without awaiting a determination of that question by the Commission and without submitting applications for certification. In these circumstances, United's conduct appears to be inexcusable, and a cease and desist order will issue. No further construction of CATV facilities should be commenced without prior certification, and applications for Section 214 certification for construction heretofore undertaken shall be filed within 20 days. Nevertheless, we shall permit United of Missouri to continue operation of its existing facilities pending further order of the Commission provided the certification applications are timely filed and within 20 days a pleading substantiated by affidavits and other supporting factual data is submitted containing the following information concerning the channel service being provided at Warrensburg to United Transmission:

(a) The amount actually expended by August 15, 1966, for equipment actually installed and for the cost of installation thereof.

(b) The amount actually expended by October 12, 1966, for equipment actually installed and for the cost of installation thereof.

(c) The amount expended between May 1, 1967, and the date of release of this decision for equipment and for the installation thereof.[36]

(d) The number of CATV subscribers of United Transmission's system as of the date of release of this decision.[37]

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[36] From United's Exhibit No. 3 (page 3) it appears that the total investment as of May 1, 1967, was $72,717.00.

[37] As of May 1, 1967, the Warrensburg CATV system of United Transmission had 170 subscribers.

(e) Whether there are any areas within Warrensburg which are served by the CATV systems of both United Transmission and Warrensburg Cable, and if there are, a description of such areas.

(f) Any public interest factors which are relevant and material to a determination of the extent to which permanent relief from the cease and desist order is warranted.

Upon receipt of this information we shall be in a better position to determine precisely what remedial action should be taken. Responsive pleadings, as heretofore authorized in like situations, may be filed within 10 days.

48. In each of the remaining communities where United of Missouri provides or proposes to provide channel service to CATV systems operated by affiliated companies, we shall, consistent with the action we are taking in other like situations, direct the telephone company to cease and desist from any further construction of CATV distribution facilities until authorization therefore is obtained, and to submit within 20 days certification applications for any construction undertaken prior to the release of this decision. With respect to any channel facilities completed and in operation on or before the release of this decision, continued operation pending further order of the Commission is authorized provided the carrier complies with the prerequisite set forth in paragraph 40, except that information supplied at the hearing need not be repeated.

49. Accordingly, It Is Ordered, That each of the respondent operating telephone companies of Bell, General, and United file within 20 days after the release of this decision applications for certificates of public convenience and necessity pursuant to Section 214 of the Act and Part 63 of the Rules for any and all construction heretofore undertaken for the purpose of providing channel service to community antenna television (CATV) systems.

50. IT IS FURTHER ORDERED, That each of the respondent telephone companies of Bell, General, and United CEASE AND DESIST from the further construction of any facilities for the purpose of providing channel service to CATV systems until applications for certificates of public convenience and necessity have been filed as required by Section 214 of the Act and Part 63 of the Rules for such construction and approval therefor is obtained from the Commission.

51. IT IS FURTHER ORDERED, That within 30 days after the release of this decision the respondent Bell System telephone companies and each of them CEASE AND DESIST from the operation of any CATV channel distribution facilities which were completed and in operation on and before the release of this decision except that upon the filing of the Section 214 certification applications required herein, the operation of such facilities may be continued in the circumstances hereinafter specified and subject to the following conditions, provisions and prerequisites:

a. The telephone companies named in the Appendix hereto are authorized to continue to provide channel service to the CATV systems specified therein pending disposition by the Commission of timely filed applications for Section 214 certification.

b. Upon the filing within 20 days after the release of this decision of a pleading by The Pacific Telephone and Telegraph Company supported by affidavits and other factual information showing that by October 11, 1966, it had expended for equipment actually installed and for the cost of installation thereof at least 50 percent of the total amount expended by February 20, 1967, for facilities to provide channel service to All-Metal Fabricators, Inc. at Altadena, California, the operation of such facilities pending further order of the Commission is authorized; and upon the timely filing of a pleading by any other Bell operating company concerning channel service

in operation on or before the release of this decision, that 50 percent or more of the total cost of facilities to provide such channel service was expended by October 21, 1966, as is more fully set forth in paragraph 34 of this decision, the operation of such facilities pending further order of the Commission is likewise authorized.

c. With respect to each community where service commenced on or before the release of this decision and the 50 percent completion test is inapplicable, the Bell operating telephone company is authorized to continue to provide channel service to the CATV system pending further order of the Commission provided a pleading is filed within twenty days containing the information outlined in paragraph 34 of this decision.

52. It Is Further Ordered, That within 30 days after the release of this decision the fully subject respondent General System telephone companies and each of them Cease and Desist from the operation of any CATV channel distribution facilities which were completed and in operation on and before the release of this decision except that upon the filing of the Section 214 certification applications required herein, the operation of such facilities may be continued in the circumstances hereinafter specified and subject to the following conditions, provisions, and prerequisites:

a. Pending action by the Commission on timely filed Section 214 certification applications, the General Telephone Company of Michigan is authorized to continue to provide channel service to Booth American Company at Muskegon, Michigan; and General Telephone Company of Ohio is authorized to continue to provide channel service to Marion CATV, Inc. at Marion, Ohio.

b. Upon the filing within 20 days after the release of this decision by General Telephone Company of Indiana of a pleading containing the information, and in accordance with the procedure, outlined in paragraph 37 of this decision, the carrier is authorized to continue to furnish channel service to Indiana Cable TV, Inc. at Terre Haute, Indiana, pending further order of the Commission.

c. Upon the filing within 20 days after the release of this decision of pleadings containing the information outlined in paragraph 38 of this decision, continued operation of CATV channel facilities pending further order of the Commission is authorized in order to provide channel services to GT&E Communications, Inc. by General Telephone Company of Indiana at Angola and Winchester, Indiana; by General Telephone Company of Michigan at South Haven, Michigan; and by General Telephone Company of the Southwest at Brownfield and Levelland, Texas.

d. With respect to any channel distribution facilities completed and in operation on and before the release of this decision, and not specifically mentioned herein, continued operation pending further order of the Commission is authorized upon the filing within 20 days of a pleading containing the date the facilities first became operative, the total cost of equipment and labor for each of the facilities constructed, and the additional information outlined in paragraph 38 of this decision.

53. It Is Further Ordered, That within 30 days after the release of this decision the fully subject respondent United operating telephone companies and each of them Cease and Desist from the operation of any CATV channel distribution facilities which were completed and in opera-

tion on and before the release of this decision except that upon the filing of the Section 214 certification applications required herein, the operation of such facilities may be continued in the circumstances hereinafter specified and subject to the following conditions, provisions, and prerequisites:

a. Upon the filing within 20 days after the release of this decision of pleadings containing the information outlined in paragraph 40 of this decision, continued operation of any such completed and operational CATV channel facilities pending further order of the Commission is authorized in order to provide channel service by United Telephone Company of the Northwest and by United Inter-Mountain Telephone Company to United Transmission, Inc., a wholly owned subsidiary of the parent corporation of the operating telephone companies.

b. With respect to any CATV channel distribution facilities completed and in operation on and before the release of this decision, and not specifically mentioned herein, continued operation pending further order of the Commission is authorized upon the filing within 20 days of a pleading containing the information outlined in paragraph 40 of this decision.

54. It Is Further Ordered, That within 30 days after the release of this decision, General Telephone Company of California and General Telephone Company of Pennsylvania, heretofore classified as connecting carriers pursuant to Section 2(b)(2) of the Act, Cease and Desist from the operation of any CATV channel distribution facilities which were completed and in operation on and before the release of this decision except that upon the filing of the Section 214 certification applications required herein, the operation of such facilities may be continued

in the circumstances hereinafter specified and subject to the following conditions, provisions, and prerequisites:

a. Pending action by the Commission on timely filed applications for certificates of public convenience and necessity, General Telephone Company of California is authorized to continue the provision of channel service to International Cable for its CATV operations at Hastings Ranch, California, and, if the channel distribution facilities were completed and in operation on and before the release of this decision, for International Cable's CATV operations at Duarte, California; and General Telephone Company of Pennsylvania is authorized to continue to furnish channel service to Laurel Cablevision for its CATV operations at Somerset, Pennsylvania.

b. Upon the timely filing of a pleading in accordance with the procedure and containing the information outlined in paragraph 42 of this decision, General Telephone Company of California is authorized to continue pending further order of the Commission, operation of channel distribution facilities completed and in operation on and before the release of this decision for the purpose of providing channel service to CATV systems owned or operated by General Telephone Company of California or by a subsidiary or affiliate of the parent General System.

c. Upon the timely filing of a pleading in accordance with the procedure and containing the information outlined in paragraph 43 of this decision, General Telephone Company of Pennsylvania is authorized pending further order of the Commission to continue operation of existing channel distribution facilities to provide channel service to a CATV system owned or operated by a subsidiary or affiliate of General.

55. It Is Further Ordered, That United Telephone Company of Ohio, United Telephone Company of Pennsylvania, Columbia-United Telephone Company, United Telephone Company of Kansas, and United Telephone Company of Missouri, heretofore classified as connecting carriers pursuant to Section 2(b)(2) of the Act, and each of them Cease and Desist from the operation of any CATV channel distribution facilities which were completed and in operation on and before the release of this decision except that upon the filing of the Section 214 certification applications required herein, the operation of such facilities may be continued in the circumstances hereinafter specified and subject to the following conditions, provisions, and prerequisites:

a. Pending action by the Commission on timely filed applications for certificates of public convenience and necessity, United Telephone Company of Ohio is authorized to continue to furnish channel service to Sidney Cable TV Co. for its CATV operations at Sidney, Ohio.

b. Upon the timely filing of a pleading in accordance with the procedure and containing the information outlined in paragraphs 44 and 45 of this decision, each of the above-mentioned telephone companies, except United Telephone Company of Missouri, is authorized pending further order of the Commission to continue operation of channel distribution facilities completed and in operation on and before the release of this decision for the purpose of providing channel service to CATV systems owned or operated by a subsidiary or affiliate of United.

c. Upon the timely filing of a pleading in accordance with the procedure and containing the information outlined in paragraph 47 of this decision, United Telephone Company of Missouri is authorized pending further order of the Commission to continue operation of the channel distribution facilities for the purpose of furnishing channel service at Warrens-

burg, Missouri, to United Transmission, Inc., a wholly owned subsidiary of United.

d. Upon the timely filing of a pleading in accordance with the procedure and containing the information outlined in paragraph 48 of this decision, United Telephone Company of Missouri is authorized pending further order of the Commission to continue operation of channel distribution facilities in each of the remaining communities, other than Warrensburg, Missouri, where it operates such facilities for the purpose of providing channel service to CATV systems owned or operated by a subsidiary or affiliate of United.

56. It Is Further Ordered, That in each of the situations where a pleading is authorized to be filed within 20 days after the release of this decision, responsive pleadings ARE AUTHORIZED within 10 days after the expiration of such 20-day period, but no reply pleading will be entertained.

57. It Is Further Ordered, That the unopposed motion to correct the transcript of hearing filed by NCTA on September 5, 1967, IS GRANTED.

58. It Is Further Ordered, That the motion to strike filed by Bell on March 12, 1968, IS DENIED since the comments to which reference is made have no decisional significance.

59. It Is Further Ordered, That motions to correct the transcript of oral argument filed on March 4, 1968, by the CATV Task Force; on March 5, 1968, by the Common Carrier Bureau; on March 8, 1968, by United; on March 12, 1968, by General; and on March 13, 1968, by Bell, ARE GRANTED.

Federal Communications Commission

Ben F. Waple

Ben F. Waple

Secretary

(Seal)

Bell Operating Co.	*CATV Operator*	*Communities Served*
C&P of Virginia	Pulaski Television System	Pulaski, Virginia
C&P of W. Virginia	C&S TV Company	Chester, W. Va.
Illinois Bell	Dwight Perfect Picture Cable TV, Inc.	Dwight, Ill.
	Iroquois Cable Company	Watseka, Ill.
	Morris CATV, Inc.	Morris, Ill.
Indiana Bell	Marion Cable Television, Inc.	Marion (Grant County) Indiana
Michigan Bell	Consolidated Land Co.	Lakeshire Village, Michigan
	Lakeside Mobile Court	Lakeside Mobile Ct. in Flint, Mich.
	Port Huron TV Cable Co.	Port Huron, Mich.
	Twin Valley CATV, Inc.	Hillsdale and Jonesville, Mich.
	Wonderland Ventures, Inc.	Flint, Mich.
Mountain State Telephone & Telegraph Co.	Westerly Cable Television Corp.	Manitou Springs, Colorado
New England Telephone & Tele-Graph Co.	Cape Cod Cablevision Corp.	Hyannis, Mass.
	Rumford Television Service, Inc.	Rumford, Maine
	United TV Co. of New Hampshire, Inc.	Manchester, New Hampshire
	Westerly Cable Television, Inc.	Westerly, Rhode Island
New York Telephone Co.	Beacon Cable Corporation	Fishkill Township, N.Y. Fishkill Village, N.Y. Beacon, (city) N.Y.
	Broadway Maintenance CATV Corp.	Selden, N.Y. Centereach, N.Y. Medford, N. Y.
	Champlain Cable Corporation	Ticonderoga, N.Y.
	Courier Cable Corp.	Buffalo, N.Y.
	Hightower of Newburgh	Newburgh, N.Y. (city and town), and New Windsor (village and town), N.Y.
	New Platz Tele Cable	New Platz, N.Y.

Bell Operating Co.	*CATV Operator*	*Communities Served*
Ohio Bell	Buckeye Cablevision, Inc.	Toledo, Ohio
	Imperial Broadcasting Corp.	Louisville, Ohio & Canton, Ohio
	Ironton Metropolitan Housing	Ironton, Ohio (Metropolitan Housing Authority Bldgs.)
	Telerama, Inc.	Shaker Heights, Warrensville Heights, and Warrensville Township, Ohio
	Valley Antenna Systems, Inc.	Piqua, Ohio
Pacific Telephone Co.	Omni-Video, Inc.	Mission Valley, Calif. (Section of San Diego)
	Warner Bros. TV Services	Mission Viejo, Calif.
Southern Bell	Cablevision, Inc.	Gastonia, N. Car.
	Rentavision of Brunswick, Inc.	Brunswick, Ga.
Southwestern Bell	Bella Vista Village, Inc.	Bella Vista, Ark.
	See TV Company	Mexico, Missouri
	Southwest CATV, Inc.	McAllen, Texas

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Supreme Court of the United States

October Term, 1969

No. 45 C

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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August 8, 1969

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT	6
REASONS FOR GRANTING THE WRIT	12
I Congressional Policy, As Reflected By The Communications Act, Requires The Preservation Of State Jurisdiction Over Intrastate Communications And Over Interstate And Foreign Communications Primarily Of Local Concern	13
II The Certification Requirements Of Section 214 Of The Communications Act Are Not Applicable To Common Carrier CATV Channel Service Facilities When Located Within A Single State Or When Not Exceeding Ten Miles In Length	21
A. Single State CATV Channel Service Facilities	21
B. CATV Channel Service Facilities Not Exceeding Ten Miles In Length	30
C. Commission Inability To Certificate Non-Common Carrier Provided CATV Channel Service Facilities	39
CONCLUSION	41

TABLE OF AUTHORITIES

Page

Cases:

Davies Warehouse Company v. Bowles, 321 U.S. 144, 88 L.Ed. 635 (1944) 41

Houston, E. & W. T. Ry. Co. v. United States, 234 U.S. 342, 58 L.Ed. 1341 (1914) 15

New York Central R. R. v. Southern Ry., 226 F.Supp. 463 (N.D. Ill. 1964), *aff'd*, 338 F.2d 667, *cert. denied*, 380 U.S. 954, *rehearing denied*, 381 U.S. 907. 29

Pennsylvania Gas Co. v. Public Service Commission of New York, 252 U.S. 23, 64 L.Ed. 434 (1920) 32, 33

Pennsylvania R. R. v. Pittsburgh, L. & W. R. R., 83 F.2d 861 (6th Cir. 1936), *cert. denied*, 299 U.S. 572 29

Pennsylvania R. R. Co. v. Public Utilities Commission of Ohio, 298 U.S. 170, 80 L.Ed. 1130 (1936). 9, 26, 29

Pennsylvania R. R. v. United States, 242 F.Supp. 890 (E.D. Pa. 1965), *aff'd.*, 382 U.S. 368, *rehearing denied*, 382 U.S. 914 (1966) 29

Texas & Pacific Railway Company v. Gulf, Colorado & Santa Fe Railway Company, 270 U.S. 266, 70 L.Ed. 570 (1926) 40

TV Pix, Inc. v. Taylor, __F.Supp. __, (Civil Action No. 1814, decided December 2, 1968). 36

United States v. Southwestern Cable Company, 392 U.S. 157, 20 L.Ed.2d 1001 (1968). . . 11, 18, 20, 39

Page

Administrative Decisions:

American Telephone and Telegraph Company,
70 P.U.R.3d 129 (1967) 37

Capital City Telephone Company,
3 F.C.C. 189 (1936) 9, 11

CATV and TV Repeater Services,
26 F.C.C. 403 (1959) 39

First Report and Order,
38 F.C.C. 683 (1965) 19

Frontier Broadcasting Co. v. Collier,
24 F.C.C. 251 (1958) 25, 26, 34, 39

Mackay Radio and Telegraph Company,
6 F.C.C. 562 (1938) 40

Second Report and Order,
2 F.C.C.2d 725 (1966) 19, 39

WSTV, Inc. v. Fortnightly Corp.,
23 Pike & Fischer, R.R. 184 (1962) 39

United States Constitution:

Article I, Section 8, Clause 3 14

Statutes:

Communications Act of 1934, as amended,
47 U.S.C. § 151, *et seq.*:

Sec. 1 17
Sec. 2(a) 22
Sec. 2(b) 3, 9, 10, 14, 15, 23
Sec. 3(e) 15
Sec. 3(h) 4, 25, 39
Sec. 3(r) 4, 31
Sec. 3(s) 4

Page

Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.*: (Cont'd.)

Sec. 3(t) 4
Sec. 3(u) 4, 10, 15
Sec. 3(v) 4
Sec. 4(i) 17
Sec. 213(h) 15
Sec. 214 . . . . . 4, 6, 8, 9, 10, 11, 15, 21, 22, 23, 24, 25, 29, 30, 34, 37, 38, 39, 40, 41
Sec. 220 16
Sec. 221(a) 16
Sec. 221(b) 5, 16, 34
Sec. 301 . . . . . 2, 14
Sec. 303(f) 17
Sec. 303(h) 17
Sec. 303(r) 17
Sec. 307(b) 17
Sec. 402(a) 11
Sec. 403 17
Sec. 410 16

Interstate Commerce Act, 49 U.S.C. § 1, *et seq.* 21, 24, 27, 29, 39

United States Code:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2342 11
28 U.S.C. § 2344 11

Miscellaneous:

Hearings on S. 2910, 73d Cong. 2d Sess. (1934) 13, 14, 32

Hearings on H.R. 8301, 73d Cong., 2d Sess. (1934) 33

Page

S. Rept. No. 781, 73d Cong., 2d Sess. (1934) 15, 21, 26, 29, 32

H. Rept. No. 1850, 73d Cong., 2d Sess. (1934) 15, 21, 26, 29, 32

Rules of the FCC, 47 C.F.R. § 74.1107(a) 18

78 Cong. Rec. 8824 (May 15, 1934). 29

78 Cong. Rec. 10314 (June 2, 1934). 29

Supreme Court of the United States

October Term, 1969

No.

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS;
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The National Association of Regulatory Utility Commissioners, your Petitioner, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the above case pending in that Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 3067), is not yet officially reported, but is reprinted in the Appendix of this Petition (A. 1). The Decision and Order of the Federal Communications Commission (R. 2853) in this cause is officially reported at 13 FCC 2d 448, and is also reprinted in the Appendix to this Petition (A. 30). Pursuant to Rules 12(4) and 21 of this Court, the Petitioner hereby adopts the transcript of the record filed with the Court in *General Telephone Company of California, et al., v. Federal Communications Commission, et al.*, No. 357, October Term, 1969, since the petitioners there seek review of the same judgment.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the Decision and Order of the Federal Communications Commission, was entered on April 30, 1969 (R. 3095; A. 27). Upon motion of the Petitioner, Associate Justice Byron R. White on July 25, 1969, entered an order extending the time for filing this Petition to and including August 8, 1969.

The jurisdiction of the Court is invoked under 28 U.S.C., Sec. 1254(1) to review the judgment of the Court of Appeals by writ of certiorari.

QUESTIONS PRESENTED

A. Whether the Decision and Order of the Federal Communications Commission, upheld below by the Court of Appeals, unlawfully extends the Commission's jurisdiction into areas primarily of local concern and reserved for State and local regulation by Title II of the Communications Act of 1934, as amended.

B. Whether the Decision and Order of the Federal Communications Commission, upheld below by the Court of Appeals, violates Title II of the Communications Act of 1934, as amended, by requiring a common carrier telephone company to obtain the prior approval of the Commission for the construction, extension, or operation of a line which will be located entirely within a single state and within a local telephone exchange service area, and which will not exceed ten miles in length.

STATUTORY PROVISIONS INVOLVED

Section 2(b) of the Communications Act of 1934, as amended (47 U.S.C., Sec. 152), provides in pertinent part that:

> Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier. . .except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

Section 3 of the Communications Act of 1934, as amended (47 U.S.C., Sec. 153), provides in pertinent part that:

> For the purposes of this Act, unless the context otherwise requires——. . .

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier. . . .

(r) "Telephone exchange service" means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange and which is covered by the exchange service charge.

(s) "Telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

(t) "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

(u) "Connecting carrier" means a carrier described in clause (2), (3), or (4) of section 2(b).

(v) "State" includes the District of Columbia and the Territories and possessions. . . .

Section 214(a) of the Communications Act of 1934,

as amended (47 U.S.C., Sec. 214(a)), provides in pertinent part that:

> No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length. . . . As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

Section 221(b) of the Communications Act of 1934, as amended (47 U.S.C., Sec. 221(b)), provides that:

> Subject to the provisions of section 301, nothing in this Act shall be construed to apply,

or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

STATEMENT

Your Petitioner, the National Association of Regulatory Utility Commissioners, hereinafter referred to as the "NARUC", was founded in 1889, and has within its membership the governmental bodies of the fifty States engaged in the regulation of carriers and public utilities. Its chief objective is to serve the public interest by seeking to improve the quality of government regulation.

The NARUC here seeks review of the Decision of the United States Court of Appeals for the District of Columbia Circuit which affirmed the Decision and Order adopted by the Federal Communications Commission on June 25, 1968, requiring that a telephone company common carrier obtain a certificate of public convenience and necessity from the Commission under Section 214 of the Communications Act of 1934, as amended, prior to the construction of distribution facilities to provide channel service to community antenna television (CATV) systems.

A CATV system is a facility which receives television signals and FM radio signals off the air by means of high antennas or by microwave transmission, amplifies the signals and distributes such signals by coaxial cable to

the premises of its subscribers who pay a fee for the service. The system consists of a number of connecting sections which may be characterized as the reception, headend, and distribution systems.

At the beginning of the system are located the towers, antennas, microwave receivers, and other equipment necessary to receive the program material. The headend section consists of the electronic equipment used to convert, modify and modulate the signals bearing the intelligence received at the antenna before traveling into the wire distribution system. Generally, the headend equipment is located in a building adjacent to the tower.

The distribution system consists of feeder or trunk lines which originate at the headend and may be branched repeatedly to reach different sections of the system; the smaller distribution cables which carry the signal to the immediate vicinity of the subscriber; and the "drop" wires which carry the signal from the distribution cable to a terminal block on the premises of the individual subscriber. The final link in the system is the cable extending from the terminal block to the television set of the subscriber.

In some instances the distribution system is provided by the CATV owner who either constructs all of the necessary facilities or strings his cable on the poles of a utility company for which a rental fee is paid pursuant to a pole line attachment arrangement. In other cases, the telephone company serving the CATV community provides the channel service transmission system. While in some instances the telephone company provides the headend equipment, it generally provides service only from the headend to the premises of the subscriber.

This case is concerned only with channel service offerings by telephone companies to CATV systems, not with the distribution system constructed by the CATV owner

or provided pursuant to pole line attachment arrangements.

The Commission in instituting the adjudicatory proceeding below (Docket No. 17333) named operating telephone companies of the American Telephone and Telegraph Company, General Telephone and Electronics Service Corporation, and United Utilities, Inc., as respondents, and posed the issue of whether these companies are subject to Section 214 of the Act with respect to the construction of facilities for offering channel service to CATV systems.

The NARUC intervened in the proceeding in an effort to protect State jurisdiction over activities of telephone companies which are primarily of local concern and subject to adequate State and local regulation.

During the hearings before the Commission, it was determined that in no case where channel service is furnished by a Bell or General System company do the facilities cross State lines; nor in any case is a subscriber located as much as ten airline miles from the headend of the CATV system serving him. Only one "connecting carrier" in the United System provides channel service to a CATV system having a subscriber living more than ten airline miles from the headend, but such service is provided solely within a single State. Only one "fully subject" carrier in the United System provides channel service across a State boundary, but each subscriber to such service resides within ten airline miles of the headend system. (R. 527, 534, 545-51, 894-934, 939).

Thus, the services in question are either provided solely within a single State, provided by a "connecting carrier", provided to subscribers all of whom are located within ten air miles of the headend, or are subject to all three of these characterizations.

Accordingly, the NARUC contended before the Commission that the CATV channel service facilities located entirely within a single State were reserved to State jurisdiction by Section 2(b)(1) of the Act which exempts from Commission jurisdiction, under the circumstances of this case, "... facilities... for or in connection with intrastate communication service by wire or radio of any carrier...". In interpreting this provision, the NARUC relied on *Pennsylvania Railroad Co. v. Public Utilities Commission of Ohio*, 298 U.S. 170, 80 L.Ed. 1130 (1936), and similar cases involving the Interstate Commerce Act—the progenitor of the Communications Act. These cases held that common carrier transportation of a product entirely within a single State cannot be combined with prior or subsequent non-common carrier transportation of the product across a State boundary so as to bring the transportation within the jurisdiction of the Interstate Commerce Commission. By analogy, the NARUC insisted that common carrier service wholly within a single State, when there is no common carrier transmission across a State boundary, is "intrastate service" within the meaning of the Communications Act since under the rationale of the above cases the interstate non-common carrier broadcast signals cannot be combined with the common carrier service for the purpose of establishing Commission jurisdiction.

The NARUC further contended that the facilities in issue were exempt from Commission certification under Section 214 by virtue of the proviso therein stating in part that "no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length...".

Moreover, the NARUC, relying on *In re Capital City Telephone Company*, 3 FCC 189 (1936), contended that

the telephone companies of the General and United Systems classified as "connecting carriers" within the meaning of Section 2(b)(2) and 3(u) of the Act were, by virtue of such status, exempt from the certification requirements of Section 214.

In essence, the NARUC contended that Title II of the Act (unlike Title III which reserves radio and television broadcasting for exclusive regulation by the Commission), clearly divides regulatory responsibility over our nationally integrated telephone system between the Commission, on one hand, and State and local governments on the other. The Congress in Title II of the Act fashioned a Federal-State partnership whereby the bulk of telephone plant and the vast majority of telephone calls were reserved to State and local jurisdiction. This partnership has been one of the most successful intergovernmental relationships in our history as evidenced by the excellent telephone service which the public receives at reasonable rates. Accordingly, the NARUC urged the Commission to apply the Federal-State partnership concept to telephone company plant used for providing CATV service and to afford the above enumerated provisions of the Act the same efficacy for this newly emerging CATV service as had long been applied to other forms of telephone service.

Nevertheless, the Commission rejected the contentions of the NARUC and held in its Decision and Order, *inter alia*:

(a) That the telphone company respondents, "fully subject" to the Communications Act of 1934, are required to obtain certificates pursuant to Section 214 prior to constructing facilities to provide channel service to CATV operators; and

(b) That the telephone company respondents, classified as "connecting carriers" under Section 2(b)(2) of

the Communications Act, are also required to obtain such certificates pursuant to Section 214 prior to constructing such facilities, and that the Commission's earlier decision in *In re Capital City Telephone Company*, 3 FCC 189 (1936), was overruled to the extent of its inconsistency with the Order.

On July 15, 1968, the Bell, General, and United respondents filed notices of appeal from the Commission's Order with the Court of Appeals for the District of Columbia Circuit, and on July 18, 1968, the NARUC filed its petition to review the Order with such Court. Jurisdiction of the NARUC's petition to review was vested in the Court of Appeals by Section 402(a) of the Communications Act of 1934 (48 Stat. 1093, 47 U.S.C., Sec. 402(a)), as amended, and the Judicial Review Act (Public Law 89-554; 80 Stat. 622; 28 U.S.C., Secs. 2342 and 2344).

Upon motion by the Commission, the Court of Appeals by *per curiam* order filed August 21, 1968, consolidated the four appeals of the telephone company respondents (Case Nos. 22,106, 22,112, 22,113, and 22,116) and the NARUC's petition for review (Case No. 22,143).

The NARUC reasserted its contentions before the Court of Appeals, but it affirmed the Decision and Order of the Commission in totality.

In its opinion, the Court of Appeals placed major reliance on *United States v. Southwestern Cable Company*, 392 U.S. 157, 20 L.Ed. 2d 1001 (1968), which upheld the authority of the Commission under Title III of the Communication Act to regulate the carriage and non-duplication of television signals by CATV systems in order to prevent a severe disruption of the television broadcasting industry. The illicit injection of Title III rationale into the interpretation of Title II is further

reflected by the observation of the Court of Appeals that:

> As we view the record now before us and consider it in light of our own holdings and the relevant holdings of the Supreme Court it seems clear that as the outlines of the CATV problem emerged the Commission acted within the scope of the Act and consistently with the broad purposes of the Act by treating its responsibilities as comprehensive and pervasive. Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority; fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication. The Supreme Court aptly characterized the functional aspect of the CATV systems as an "essentially uninterrupted and properly indivisible" stream of communication. (A. 19).

REASONS FOR GRANTING THE WRIT

This case presents to the Court for decision a monumental issue which will vitally affect the future course of Federal-State relations with respect to the regulation of telephone companies under Title II of the Communications Act. The Court is here called upon to engage in a delicate exercise of its responsibilities under the Constitution by weighing, in the light of Title II, the competing regulatory claims of the Federal and State governments over facilities within the reach of the Commerce Clause but primarily of local concern.

In this case, the Commission has moved beyond issuing regulations under Title III governing the carriage and

non-duplication of television programs by CATV systems, and has, by emasculating exemptions under Title II, sought to prescribe how, when and where the telephone companies will construct facilities to carry these programs in even the smallest communities of the Nation. Congress did not intend, nor does the public interest require, that the Commission, within the circumstances of this case, be judicially permitted to literally transform itself into the "Town Council of America." Surely the limited resources of the Commission can be better used in the public interest by focusing them upon national and international problems which are beyond the competence of State and local regulation to solve, rather than dissipating these resources in an effort to regulate telephone company construction of CATV facilities along the streets and byways of America.

With these broad observations in mind, we will now review the specific legal points involved.

I

CONGRESSIONAL POLICY, AS REFLECTED BY THE COMMUNICATIONS ACT, REQUIRES THE PRESERVATION OF STATE JURISDICTION OVER INTRASTATE COMMUNICATIONS AND OVER INTERSTATE AND FOREIGN COMMUNICATIONS PRIMARILY OF LOCAL CONCERN.

When Congress enacted the Communications Act in 1934 the telephone industry, as it is today, was deeply involved in interstate commerce. AT&T President Gifford, in testifying on March 13, 1934, before the Senate Committee on Interstate Commerce on S. 2910, a bill proposing the Act, stated that:

> There are interconnected in the United States approximately 16,600,000 telephones,

> of which 13,163,000 are Bell telephones, the balance being owned by over 6,000 connecting telephone companies and 25,000 connecting rural telephone lines. Telephone service is available to subscribers and nonsubscribers through public telephones, so that today practically anyone anywhere can speak with anyone else anywhere else any time of the day or night.[1]

Later on in his testimony, President Gifford stated that "every telephone, and hence every telephone circuit, is an interstate telephone and circuit, to which the Federal power reaches because they are instrumentalities of interstate commerce."[2]

Undoubtedly, Congress in 1934, through the exercise of its broad powers under the Commerce Clause,[3] could have totally preempted the regulation of the telephone industry because generally the same facilities were used, as they are today, for both interstate and intrastate communication.

However, Congress chose to preserve state regulation over intrastate communications and over interstate and foreign communications primarily of local concern. Congressional deference for state and local regulation is clearly evidenced by several provisions of the Act, some of which will be considered in greater detail later.

Section 2(b)(1) of the Act, subject to the radio licensing provisions of Section 301, prohibits Commission ju-

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[1] Hearing record, p. 75, 4th par.

[2] *Id.*, p. 89, 2d par.

[3] Constitution, Art. I, Sec. 8, Cl. 3.

risdiction over intrastate communications,[4] thereby precluding application of the *Shreveport Doctrine. Houston, E. & W. T. Ry. Co. v. United States* (1914), 234 U.S. 342, 58 L.Ed. 1341, 34 S.Ct. 833.

Section 2(b)(2)(3)(4), largely preserves state jurisdiction over "connecting carriers"[5] irrespective of their engagement in interstate or foreign communication through interconnection with nonaffiliated carriers.[6]

Section 3(e), in defining the terms "interstate communication" and "interstate transmission" as they relate to Title II, excludes therefrom "wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.".

Paragraph (h) of Section 213 provides that nothing in that Section, relative to Commission valuation of carrier property, "shall impair or diminish the powers of any State Commission.".

Section 214, requiring certificates of public convenience and necessity for construction, acquisition or operation of lines, exempts from certification (1) lines within a single state which are not part of interstate lines, (2) local, branch or terminal lines not exceeding ten miles in

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4 Report No. 781 of Senate Committee on Interstate Commerce, dated April 17, 1934, to accompany S. 3285, a bill proposing the Communications Act of 1934, 73d Cong., 2d Sess., p. 3.

5 Defined in Section 3(u) of Act.

6 Report No. 1850 of House Committee on Interstate and Foreign Commerce, dated June 1, 1934, to accompany S. 3285, a bill proposing the Communications Act of 1934, 73d Cong., 2d Sess., pp. 2 and 4.

length, and (3) lines acquired through consolidation of common carriers. Consequently, these exempted facilities are reserved for state regulation.

Section 220, relating to accounting and depreciation matters, authorizes the Commission to exempt various classes of carriers from the requirements of the Section in cases where the carriers would be subject to state commission regulation (Par. (h)), and requires the Commission to consult with state commissions in administering the Section (Par. (i)), and further requires the Commission to report to Congress any need for legislation to harmonize federal-state regulatory efforts involving the subject matter of the Section (Par. (j)).

Section 221(a), relating to consolidation of telephone companies, requires that state commissions be notified of proposed consolidations and that they be given an opportunity to be heard. The Section states that nothing therein "shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies."

Section 221(b) provides that the Commission shall not have jurisdiction with respect to charges or facilities in connection with wire, mobile, or point-to-point radio telephone exchange service "even though a portion of such exchange service constitutes interstate or foreign communication" in any case where such matters are subject to state or local regulation.

Section 410 provides for Commission use of state joint boards and federal-state joint hearings in administering the Act, and for consultation between the Commission and the state commissions, and for other cooperative endeavors.

These provisions of the Act have resulted, as we shall hereinafter document, in the bulk of telephone plant and

the vast majority of telephone calls being reserved for State and local jurisdiction.

Also, these provisions of the Act clearly demonstrate that Congress intended to commit to the Commission the regulation of matters beyond the ability of the States to individually regulate, and to preserve state regulation in matters primarily of local concern irrespective of their involvement in interstate or foreign communication.

In ascertaining the scope of congressional legislation, a due regard for a proper adjustment of the local and national interests in the federal scheme must always be in the background.

The Commission, in its regulatory efforts affecting the CATV industry, has selected two distinct and separable jurisdictional bases in the Communications Act to accomplish two distinct and separable objectives.

The Title III Objective

The objective of the Commission under Title III of the Act is to regulate the television program market in such a manner as to prevent CATV systems from disrupting the television broadcasting industry. The Commission, relying on Section 1, 4(i), 303(f)(h)(r), 307(b) and 403 of the Act, has adopted regulations governing the carriage and nonduplication of television programs by CATV systems in an effort to achieve a proper relationship between basic broadcast service and CATV service.

The FCC, as to the first objective, is primarily concerned with the serious competitive impact of CATV services upon local broadcasting stations and the threatened economic elimination of the latter as a result of CATV duplication of the very programs upon which the local station relies for its sponsor-advertising revenues.

The FCC believes such a result would completely deprive surrounding rural populations which are not served by CATV, and such portion of the urban community population as could not afford the CATV's monthly service charges, of all television reception and, further, would deprive the whole community of important local interest programs, local projects, news, weather, etc., which are generally provided by a local broadcasting station.

With this problem in mind, the FCC has evolved a regulatory scheme employing carriage and non-duplication provisions which is designed to foster a public interest-oriented relationship between CATV companies and local broadcasting stations. These regulations clearly reflect that the FCC is primarily concerned with regulating the carriage of television programs in such a fashion as to protect the local broadcasting stations from ruinous competition from CATV systems. Such a regulatory undertaking can be best handled by the FCC. The States have no desire to enter this area.

This assertion of FCC jurisdiction was affirmed by this Court on June 10, 1968, in *United States v. Southwestern Cable Company*, 392 U.S. 157, 20 L. Ed. 2d 1001. Specifically, this Court upheld the authority of the FCC to regulate the extension of certain television signals by a CATV system.

Following a complaint, the FCC initiated proceedings pursuant to its Rule, 47 CFR, Sec. 74.1107(a), which provides:

> No CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such

> extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau on the basis of the net weekly circulation for the most recent year.

It was alleged that the respondent transmitted the signals of a Los Angeles television station into the San Diego area, the 54th largest television market. The FCC restricted the expansion of respondent's system pending full review of complaints received, 4 FCC 2d 612, but the Ninth Circuit Court of Appeals held that the Commission lacked such authority under the Communications Act of 1934, 47 U.S.C., Sec. 151 *et seq.* This Court reversed.

After initial determinations that it had no regulatory authority over CATV systems, 26 FCC 403, the Commission has ultimately held that it has authority under the Communications Act (1) to require CATV systems to transmit to their subscribers the signals of any station into whose service area they have brought competing signals, First Report and Order, 38 FCC 683, 716-19, and (2) to forbid the duplication of the programming of such local stations for certain periods before and after a local broadcast, *Id.* at 719-30. Finally, the Commission made the above two requirements applicable to both microwave and cable CATV systems in addition to the importation limitation set forth in the Second Report and Order, 2 FCC 2d 725.

In considering the scope of the Commission's regulatory authority under the Communications Act, this Court specifically held that "CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates ... television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible." 392 U.S. 168, last par. 20 L. Ed. 2d 1011(2).

After noting that "CATV systems are not common carriers within the meaning of the Act", 392 U.S. 169, 20 L. Ed. 2d 1011, ftn. 29, this Court held that "the Commission's authority over 'all interstate ... communication by wire or radio' permits the regulation of CATV systems." 392 U.S. 178, 1st par., 20 L. Ed. 2d 1016(14).

This Court's holding was specifically limited, however, to an approval of Commission jurisdiction "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." This Court expressed "no views as to the commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." 392 U.S. 178, 2d par., 20 L. Ed. 2d 1016(15).

This decision by this Court is entirely consistent with the position of the NARUC in this case. In *Southwestern Cable*, this Court simply upheld, in the absence of a contrary statutory prescription, the Commission's exercise of jurisdiction "reasonably ancillary" to the effective performance of its responsibilities under Title III of the Act. In no way may the case be interpreted to permit the Commission to sweep away the provisions of

Title II of the Act which reserve to the States regulatory jurisdiction over the facilities in issue here.

The Title II Objective

The objective of the Commission, which is now in issue before this Court, is to enlarge its jurisdiction under Title II of the Act over telephone common carriers by requiring them to obtain certificates pursuant to Section 214 of the Act with regard to the construction of channel service facilities for use by CATV systems.

The failure of the Commission to accomplish this objective would not impair, or be inconsistent with, its regulatory accomplishment of the Title III objective.

II

THE CERTIFICATION REQUIREMENTS OF SECTION 214 OF THE COMMUNICATIONS ACT ARE NOT APPLICABLE TO COMMON CARRIER CATV CHANNEL SERVICE FACILITIES WHEN LOCATED ENTIRELY WITHIN A SINGLE STATE OR WHEN NOT EXCEEDING TEN MILES IN LENGTH.

A. Single State CATV Channel Service Facilities

Section 214 of the Communications Act of 1934 was derived from, and is similar to, Section 1 (18-22) of the Interstate Commerce Act relating to ICC certification of the construction or extension of a "line of railroad."[7]

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[7] Report No. 781 of Senate Committee on Interstate Commerce, dated April 17, 1934, to accompany S. 3285, a bill proposing the Communications Act of 1934, 73d Congress, 2d Session, page 5; Report No. 1850 of House Committee on Interstate and Foreign Commerce, dated June 1, 1934, to accompany S. 3285, 73d Congress, 2d Session, page 6.

A proviso in Section 214 states that no certificate shall be required from the Commission "under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length. . .".

Since the "lines" at issue herein are located entirely within a single state and are not connected to the line of another carrier, the NARUC submits that they are exempted by clause (1) of the above proviso.

The Commission held, however, that the carriers' lines are but "links" in the interstate transmission of television signals and are therefore non-exempt "interstate lines" within the meaning of clause (1). (A. 44-48, para. 17-20).

Specifically, the Commission's argument begins with the definition of "line" found in Section 214(a): "any channel of communication . . . other than a channel of communication established by the interconnection of two or more existing channels." The Commission then concludes that since CATV operators are engaged in communication that crosses a state line, those who provide services or facilities to CATV operators are "links" in the interstate television signal transmission process and are therefore providing "interstate lines" irrespective of the character, location or function of those lines.

Although such CATV operators may distribute interstate signals to their customers, their common carrier provided facilities are not "interstate lines" within the meaning of Section 214.

In ascertaining the congressional intent regarding Section 214, we should first note that the Section must be read in conjunction with Section 2(a) which provides that the Act shall "apply to all interstate and foreign

communication by wire or radio and all interstate and foreign transmission of energy by radio . . .". Consequently, if Section 214(a) had been enacted *without* the provisos, Congress would have intended for the Commission to certificate all subject common carrier lines engaged in "interstate or foreign communication."

However, Congress did not see fit to grant such ubiquitous authority to the Commission. For this reason, it inserted the provisos in Section 214(a) to limit the sweep of its opening clause. It is *very important* to keep in mind that the lines referred to in clauses (1) and (2) of the first proviso are lines involved in "interstate or foreign communication" and that they are not lines involved in intrastate communication. If clauses (1) and (2) referred to lines involved in intrastate communication then the clauses would be completely useless because the Communications Act specifically states that it shall not apply to intrastate communication. See Sec. 2(b)(1).

Clause (1) of the first proviso states that no certificate shall be required for "a line within a single State unless such line constitutes part of an interstate line". In other words, clause (1) says that no certificate shall be required for a line involved in interstate or foreign communication within a single state unless such line constitutes part of an interstate line.

Now what is meant by the term "interstate line"? If it means a line engaged in interstate communication, as some contend, clause (1) would then say that no certificate shall be required for a line involved in interstate or foreign communication within a single state unless such line constitutes a part of interstate communication. Such an interpretation of "interstate line" destroys the efficacy of the proviso's clause (1) because the opening clause of Section 214 would have accomplished precisely that without any assistance from clause (1) as so construed.

However, if the term "interstate line" means simply what it says—a line crossing a state boundary—clause (1) of the first proviso is then rendered intelligible. It means then that an interstate communication line physically located entirely within a single state is exempt from Commission certification simply because the state commission is fully competent to regulate a line located entirely within its jurisdiction. On the other hand, if the line is a part of a line crossing a state boundary, two or more states are involved and Commission certification is imposed to avoid the possibility of state regulatory conflicts.

Any other definition of "interstate line" would emasculate clause (1).

Furthermore, it is clear that the word "line" as used in Section 214 and as used in its forebearer, Section 1 (18-22) of the Interstate Commerce Act, means the line of a common carrier. The basic purpose of a Section 214 type provision is to prevent the uneconomic duplication of the physical facilities of common carriers.

Section 214 only applies to common carriers and all lines referred to therein must be certificated by the Commission unless exempted.

The Commission determined, on the basis of CATV systems being engaged in interstate communications, that such communications constitute a "line"which begins at a television broadcast station in one state and ends in another state where the broadcast signals are picked up by the antenna of a CATV operator and distributed to its customers through common carrier provided channel service facilities located entirely within the receiving state. This determination is fallacious because the broadcast link in such interstate communication does not constitute part of an "interstate line" within the meaning of Section 214. This is so for three reasons.

First, the broadcasting of television signals does not create a "line" as that term is commonly understood. Second, the broadcaster is not a common carrier nor is it subject to Section 214. See Sec. 3(h). Third, if the broadcasting of television signals created an "interstate line", then such broadcasting would have to be certificated under Section 214 like any other "line".

A further fallacy in the reasoning of the Commission is illustrated by its tacking the signal of a non-common carrier television broadcaster to the single State lines of a common carrier in order to produce an "interstate line" supposedly within the meaning of Section 214. The illegitimacy of such tacking has been recognized previously by the Commission and by this Court in several decisions involving analogous situations.

In *Frontier Broadcasting Co.*, 24 F.C.C. 251 (1958), the Commission, in holding that it lacked jurisdiction to regulate CATV systems as common carriers under Title II, properly expressed doubts as to its jurisdiction over common carrier lines used to furnish CATV distribution service, saying:

> *... Although CATV systems, as common carriers, might be subject to the rate-making and other conventional regulatory powers of the Commission, such systems in most instances would not be required to obtain any authorization or certification from the Commission prior to commencement of operation,* nor could the Commission limit the period of time in which such systems could continue in operation. For example, common carriers are not required to obtain any certification or other authorization under Section 214(a) of the Act to construct

or operate "local, branch, or terminal lines not exceeding ten miles in length."[6] ...

[6]Even if held to be common carriers, it is also debatable whether most CATV systems would be subject to the provisions of Title II of the Communications Act inasmuch as the physical facilities of most systems are situated within a single State. Notwithstanding that such systems may pick up and distribute television signals and programs originating in other States, there is substantial question whether their operations could be construed to involve interstate common carriage. See Pennsylvania R.R. Co. v. P.U.C. of Ohio, 298 U.S. 170." (24 FCC at 255) (Emphasis supplied.)

The Commission's reference in its above-quoted opinion in the *Frontier Broadcasting Co.* case to the *Pennsylvania R.R.* case constituted recognition of the legal rule that interstate lines of non-common carriers cannot be combined with common carrier lines within a state in order to bring the latter within a statutory provision, which, as does Section 214(a) of the Communications Act, regulates only interstate lines of common carrier.

In *Pennsylvania Railroad Co. v. Public Utilities Commission of Ohio,* 298 U.S. 170, 80 L.Ed. 1130 (1936), a coal company, after mining coal in Pennsylvania and transporting it by barges between points in Pennsylvania, transported the coal over its own railroad from Pennsylvania to its plant in Ohio. There the coal was washed, broken, assorted and then shipped by common carrier railroad to other points in Ohio. The Supreme Court ruled that the carriage by the common carrier railroad within Ohio was not subject to regulation by the Interstate Commerce Commission under Part I of the Interstate Commerce Act (from which Part II of the Communications Act was derived).[8]

[8] See S. Rep. No. 781, to accompany S. 3285, 73d Cong., 2d Sess. 2 (1934); H.R. Rep, No. 1850, to accompany S. 3285, 73d Cong., 2d Sess. 3 (1934).

Speaking for the Court Mr. Justice Cardozo declared:

"The transportation of the coal from Negley, Ohio, to Youngstown in the same state, was an intrastate service, not subject to the provisions of the Interstate Commerce Act, and its character in that regard was not changed because of preliminary carriage from the Pennsylvania mines in barges and cars belonging to the shipper.

"Appellants say that from the moment the coal left the mines in Pennsylvania there was a continuing intention to deliver it to consumers in another state, whether their identity at the beginning was known or unknown, and that a movement impelled by that intention is interstate commerce which Congress has the power to regulate at any stage of the ensuing transit .... But there is confusion of thought in such a statement of the problem. Not all commerce is transportation, and not all transportation is by common carriers by rail. *The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission.* The Interstate Commerce Act (49 U.S.C. §1 *et seq.*) is aimed at common carriers exclusively, § 1(1), (3), and not even at all these.... Even though the activities are those of common carriers by rail, the statute does not apply 'to the transportation of passengers or property ... wholly within one State and not shipped to or from a foreign country from or to any place in the United States.'

§1(2)(a), (b). . . . And 'wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier."' §1(3).

"With the aid of these definitions the problem before us takes on a new simplicity. . . . The transportation between Pennsylvania and Ohio was by the owner, who was not a common carrier, but furnished implements of carriage for its own use exclusively. *Appellants would have us hold that this interstate transportation by an owner who does not carry for any one else will be tacked to the intrastate transportation by railroads who are in business as common carriers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process.* . . .

"*Neither in the cases cited by the appellants nor in any others known to us has transportation by a common carrier been combined with carriage by an owner for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt.* Such a fusion, if permitted, would lead to strange results. The situation laid before us would not be changed in its essentials if a cooperative association of farmers doing business in Pennsylvania close to the state line were to use a fleet of trucks belonging to the association or its members to carry milk or vegetables from Pennsylvania to a railroad station in Ohio. Even though this were done systematically and not casually or in sporadic instances, the ensuing transportation by rail, if kept within Ohio, would not be transportation between the states within the meaning of the Act of Congress. If the concept of transportation is in

need of expansion, it is for the legislative department of the government to determine how great the change shall be." (298 U.S. at 173-77). (Emphasis supplied.)[9]

The rationale of the above decision has been followed in cases specifically involving the question whether a certificate was required for the construction of a line. *Pennsylvania R.R. v. Pittsburgh, L. & W. R.R.*, 83 F.2d 861 (6th Cir. 1936), *cert. denied*, 299 U.S. 572; *New York Cent. R.R. v. Southern Ry.*, 226 F. Supp. 463 (N.D. Ill. 1964), *aff'd*, 338 F.2d 667, *cert. denied*, 380 U.S. 954, *rehearing denied*, 381 U.S. 907. These cases hold that for purposes of Section 1(18) of the Interstate Commerce Act, which, like Section 214(a), deals with certificates for the construction of lines, noncommon carrier lines cannot be combined with common carrier lines to bring a line under certificate requirements.

The above cases under the Interstate Commerce Act are directly in point.[10] These cases support the conclu-

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[9] In the recent case of *Pennsylvania R.R. v. United States*, 242 F. Supp. 890 (E.D. Pa. 1965), *aff'd.*, 382 U.S. 368, 372, *rehearing denied*, 382 U.S. 914 (1966), Mr. Justice Cardozo's opinion in *Pennsylvania R.R. v. Ohio P.U.C.*, *supra*, was approved and followed in holding that the Interstate Commerce Commission did not have jurisdiction over intrastate transportation by for-hire motor carriers under Part II of the Interstate Commerce Act, where goods had moved or would move to or from points outside the state by private motor carriers.

[10] Section 1(18) of the Interstate Commerce Act, which requires a certificate of convenience and necessity for the construction or extension of a line of a railroad, is one of the provisions from which Section 214 of the Communications Act was derived. See S. Rep. No. 781, to accompany S. 3285, 73d Cong., 2d Sess. 5 (1934); H.R. Rep. No. 1850, to accompany S. 3285, 73d Cong., 2d Sess. 6 (1934); 78 Cong. Rec. 8824 (May 15, 1934); 78 Cong. Rec. 10314 (June 2, 1934). (Cont'd)

sion that the telephone companies, in providing their CATV channel service, are not using lines which constitute "part of an interstate line." The noncommon carrier broadcast signal, even if it could be considered a "line," could not properly be combined with a common carrier's CATV distribution line located wholly within one state to constitute an "interstate line" under Section 214(a).

We believe that these considerations plainly demonstrate that common carrier provided CATV channel service facilities, which are located entirely within a single state, are exempt from Commission certification under clause (1) of the first proviso.

B. CATV Channel Service Facilities Not Exceeding Ten Miles in Length

Clause (2) of the first proviso of Section 214(a) provides that no certificate shall be required for the construction, acquisition or operation of "local, branch, or terminal lines not exceeding ten miles in length." In other words, clause (2) exempts from Commission certification local, branch or terminal lines engaged in interstate or foreign communication, even if actually crossing a state boundary, if they do not exceed ten miles in length.

The Commission, however, although recognizing that "the legislative history sheds little light on the subject," nevertheless concluded that "the exemption is intended to apply to minor additions or improvements to existing facilities or services and the expenditure involved is ordinarily small."(A. 48, par. 21).

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10 (Cont'd)
Although there are specific differences between the two acts in the coverage of the certificate requirements, these differences are not pertinent to the concept of what is an interstate line of a common carrier under Section 214(a).

The first difficulty with the Commission's position, however, is that the statute refers to "local, branch, or terminal" lines. It makes no mention of "additions" or "improvements," whether or not facilities were pre-existing, or how much they cost. Ordinarily, interpretations of a statute as far afield from the plain meaning of the statutory language have some basis in the legislative history. Yet the Commission claims that the legislative history "sheds little light" on the meaning of the terms at issue.

The Commission, without citation of any apposite authority, characterizes the facilities as " 'main' communication lines" requiring "substantial outlays of funds." (A. 48, par. 22). There is no justification for such a holding.

The plain meaning of a local line is one confined to the geographical area involved here. It was such a line that the Congress intended the States to regulate irrespective of its "importance" or "cost." The Commission has baldly adopted a criterion which Congress did not prescribe or intend. It is difficult to conclude anything else but that the Commission has engaged in the most tortured construction in seeking to destroy the very clear exemption of such lines from its jurisdiction.

If the facilities at issue here, which, in general, are not only located within a single state, but also within a single telephone exchange area, are not "local" in character then the term is simply rendered meaningless. The local telephone exchange area,[11] is an area which Congress has committed to state and local regulation under Section 221(b) of the Act.

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[11] "Telephone exchange service" is defined by Section 3(r).

The Senate and House Committees, in reporting S. 3285, a bill proposing the Communications Act of 1934, both stated that Section 221(b) was inserted to "conform to recommendations of the State commissions and will enable those commissions, when authorized to do so, to regulate exchange services in metropolitan areas overlapping State lines.[12]

The witnesses for the NARUC and the state commissions characterized service within exchange areas as being local and primarily of state concern. For example, NARUC General Solicitor Benton, in testifying before the Senate Committee on Interstate Commerce on March 15, 1934, stated that:

> . . . The Federal Government is the only Government that can regulate interstate toll rates. The Federal Government should accordingly have full and effective powers of regulation as to those.
>
> On the other hand, exchange service is local. There is no reason why people having complaints about their exchange service or rates should be compelled to carry their complaints to Washington. Such service is subject to State regulation. Even though it passes over State lines, by reason of its local character, the State where the service is delivered may regulate. This the United States Supreme Court held very clearly in the *Pennsylvania Gas Co.* case. (252 U.S. 23).[13]

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[12] Report No. 781 of Senate Committee on Interstate Commerce, dated April 17, 1934, 73d Cong., 2d Sess., p. 5; Report No. 1850 of House Committee on Interstate and Foreign Commerce, dated June 1, 1934, 73d Cong., 2d Session, p. 7.

[13] Hearing Record on S. 2910, p. 180, 5th par.

And NARUC First Vice President McDonald of Wisconsin, in testifying on March 14th before the same Committee, stated that:

> We endorse the principle of this bill, because it specifically reserves to the State Governments their rightful powers over matters of purely State concern, such as so-called exchange or local rates of telephone companies.[14]

McDonald made the same statement on May 9, 1934, in testimony before the House Committee on Interstate and Foreign Commerce.[15]

NARUC General Solicitor Benton, in testifying before the same House Committee on May 9th, stated that:

> Section 221(b) recognizes the local character of exchange service, even though to some patrons of a particular exchange, the service may be rendered across State lines. Taking advantage of the rule laid down in the *Pennsylvania Gas Co. v. Public Service Commission of New York*, (252 U.S. 23), which holds that in the case of such local service, a State may regulate where Congress does not regulate; exchange service is left, by section 221, to the exclusive regulation of the State, where the State has made provision for regulation by a State commission.[16]

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[14] *Id.*, p. 156, 2d par.

[15] Hearing Record on H.R. 8301, p. 132, 4th par.

[16] *Id.*, p. 137, 2d par.

Furthermore, the Commission in the *Frontier Broadcasting Company* case (1958), 24 FCC 251, which held that CATV systems are not common carriers under the Act, stated that:

> . . . Although CATV systems, as common carriers, might be subject to the rate-making and other conventional regulatory powers of the Commission, such systems in most instances would not be required to obtain any authorization or certification from the Commission prior to commencement of operation, nor could the Commission limit the period of time in which such systems could continue in operation. *For example, common carriers are not required to obtain any certification or other authorization under Section 214(a) of the Act to construct or operate "local, branch, or terminal lines not exceeding ten miles in length."* . . . (Page 255).

These quotations clearly indicate that Congress and the Commission have characterized service within a local exchange as being local in nature.

Accordingly, we believe that the CATV lines in issue here are plainly "local" because in general they are not only located within a single State, but are also within a single telephone exchange area—an area which Congress has committed to State and local regulation under Section 221(b) of the Act even in instances when exchange services in metropolitan areas overlap State lines.

For example, the very large Washington metropolitan exchange area encompasses the District of Columbia and parts of Maryland and Virginia and calls therein are subject exclusively to State and local regulation. The dimensions of the exchange area are measured by the distance you can call without incurring a toll charge.

Obviously, service rendered within this exchange area or in any other is "local" within the meaning of the Communications Act.

The relationship between the national volumes of "local" and "toll" calls is revealed by a publication entitled "Statistics of Communications Common Carriers" issued by the Commission for the year ended December 31, 1966, pages 16-17, of which the Court may take judicial notice. This publication—the latest issue of its kind—reveals that during 1966 there were 134,058,911,000 "local" calls and 6,646,954,000 "toll" calls. Since all of the local calls, and that portion of the toll calls which were intrastate, are subject to State and local regulation, it is obvious that the telephone business in the Nation is predominantly "local" within the meaning of the Communications Act.

Furthermore, in fully considering the relationship between the words "main" and "local" we must evaluate the relative importance of CATV service and telephone exchange service to the average subscriber.

A subscriber in the Washington metropolitan exchange area, upon acquiring CATV service for his television set, would receive a clearer picture of the TV programs he now receives and would also receive programs from distant television stations if permitted by the Commission. Supposedly, the entertainment he receives from his TV set would be enhanced.

On the other hand, the communications service which the telephone subscriber receives in the Washington metropolitan exchange area is virtually indispensable in today's society. Not only can he talk with his friends and business associates, but he can call a doctor if he or a member of his family requires emergency medical attention. He can call the police if he is threatened with

bodily harm or otherwise requires protection. He can call the fire department to report a fire.

If a subscriber in the Washington metropolitan exchange area or in any other had to choose between the Commission's so-called "main" line CATV service or his "local" telephone service, which would he choose? Which is the most important to his personal and business life?

CATV service is not a "main" line service as the Commission would have us believe, but rather a service of far less importance to the public than local telephone exchange service.

The Commission says it should have jurisdiction over CATV lines because they carry interstate signals. This is irrelevant under the language of the exemption. In contrast, the local telephone exchange service is an integral part of the national and international toll network and yet it is reserved exclusively for State and local regulation. It is the gateway to the toll network and without it the toll network would be worthless.

The latest recognition of the local character of CATV service is reflected by the decision of a Three Judge Federal District Court in Nevada issued on December 2, 1968, in *TV Pix, Inc. v. Taylor, et al.*, ____ F. Supp. ____, Civil Action No. 1814. In this decision, the Court upheld a State statute empowering the Nevada Public Service Commission to regulate CATV companies as public utilities. The statute was unsuccessfully challenged on the grounds: that it imposed an unconstitutional burden on interstate commerce; that Congress had preempted the field of television communications; and that the statute deprived the plaintiff of its property without due process of law.

In upholding State regulation the Court stated that:

> . . . the apparatus of the community antenna

> system is an appendage to the primary interstate broadcasting facilities with incidents much more local than national, involving cable equipment through the public streets and ways, local franchises, local intrastate advertising and selling of services and local intrastate collections. In this perspective, a community antenna system is essentially a local business and, in its impact on interstate commerce, is analogous to a local express or parcel delivery service or a local pilotage or lighter service organized to facilitate the final interstate delivery of goods to the named consignee. . .

The Commission next contends that CATV lines are not "local" lines because they require "substantial outlays of funds." As noted above, the language of Section 214(a)(2) makes no reference to cost.

Nevertheless, it is helpful, in analyzing the validity of the Commission's contention, to also place the element of cost in its proper perspective.

The Commission stated in its brief below, p. 8, that "the record shows the investment cost of the then extant Bell channel service facilities to be $43,240,019.00." This is apparently an indication of the "substantial outlay of funds" the Commission has in mind. (See also A. 11).

The Statistics of Communications Common Carriers, referred to above, reports at page 33 that the total net communications plant of the Bell System is $30,765,568,524.00. The Commission in an Interim Decision and Order issued on July 5, 1967, in *Re American Telephone and Telegraph Company et al.*, 70 PUR 3d 129, at page 145, par. 21, stated that "In terms of plant investment and revenues, the interstate and foreign service of the Bell System respondents account for about

25 per cent of their total operations." In paragraph 22, page 146, of the same case, the Commission states that the net plant investment of Bell devoted to interstate and foreign services is $8,606,209,000.00.

Comparing these figures together, we see that approximately 22 billion dollars of the Bell plant is subject to State and local regulation and approximately 8½ billion dollars is subject to Commission regulation.

For the Commission to seek to hang its jurisdiction in this case on an insignificant 43 million dollar investment by Bell in CATV lines is ludicrous to say the least in view of the total Bell investment and the division of regulatory responsibility.

Finally, the Commission contends that CATV service is significantly different from that theretofore provided and that, consequently, this new service does not fall within the 214(a)(2) exemption regarding "local" lines. The plain meaning of the language of the 214(a)(2) exemption makes no reference to the kind of service afforded by the "local" lines.

Furthermore, the Commission's newly invented "new service" theory for Section 214 certification was not applied when common carriers long ago provided similar new services to television and radio broadcasters, nor was it applied in the transmission of data.

In view of this consideration, we believe that any common carrier provided CATV channel service facility not exceeding ten miles in length is exempt from Commission certification under clause (2) even if it crosses a state boundary.

C. Commission Inability to Certificate Non-Common Carrier Provided CATV Channel Service Facilities

Another consideration militating against Commission certification of common carrier provided CATV channel service facilities is the inability of the Commission to certificate channel service facilities provided by CATV operators who are not common carriers.

The certificate requirements of Section 214 only apply to "carriers", which term is defined by Section 3(h) of the Act as follows:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

The Commission has consistently held that CATV systems are not common carriers within the meaning of Section 3(h) and, hence, do not come within the provisions of Title II applicable to carriers. *Second CATV Report and Order* (1966), 2 FCC 2d 732 (17); *Frontier Broadcasting Company* (1958), 24 FCC 251; *CATV and TV Repeater Services*, 26 FCC 403, 427-428; and *WSTV, Inc. v. Fortnightly Corp.*, 23 Pike & Fischer, R.R. 184. See also *United States v. Southwestern Cable Company*, 392 U.S. 157, 169, ftn. 29, 20 L. Ed.2d 1001, 1011, ftn. 29 (1968).

Obviously, Congress intended when it enacted Section 214 and its forebearer, Section 1 (18-22) of the Interstate Commerce Act, that only Commission regulated carriers would be constructing the "lines" referred to

therein. The purpose of Section 214 was recognized by the Commission in the Order below (A. 44, par. 16) in the following terms:

> Manifestly, Congress intended by Section 214 to confer upon the Commission broad supervisory control over construction by communications common carriers in order to insure that such construction would not be inconsistent with the public interest; *e.g.*, not wasteful or unnecessary. *Mackay Radio and Telegraph Company*, 6 FCC 562 (1938). As the Supreme Court stated in construing and applying comparable language in the Interstate Commerce Act[17]" . . . the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public . . . ."

[17] *Texas & Pacific Railway Company v. Gulf, Colorado & Sante Fe Railway Company*, 270 U.S. 266, 277 (1926).

However, the Commission simply cannot carry out the Congressional intent within the context of the subject matter of this case. To hold Section 214 certification requirements applicable to common carrier provided CATV channel service facilities, would mean that the Commission could only exercise jurisdiction over a fraction of the subject matter. Any common carrier line certificated by the Commission could later be paralleled by a CATV system operator, thereby rendering certification pointless and causing a consequent "waste of resources."

The regulatory purpose reflected by Section 214 logically presupposes that the regulatory body shall have jurisdiction over the construction of *all* lines. Otherwise,

it cannot prevent the uneconomic duplication of facilities.

The regulatory concept of 214 cannot be rationally applied in the manner attempted by the Commission.

CONCLUSION

This Court in *Davies Warehouse Company v. Bowles,*[17] reaffirmed one of the basic tenets of our federal system of government when it said:

> Local institutions, customs, and policies, will not be overriden without fighting for consideration. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation. At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that "'the extension of federal control into these

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[17] 321 U.S. 144, 154, 88 L. Ed. 635, 642, r. col., 2d par. (1944).

> traditional local domains is a 'delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.' "

In the light of this philosophy and for the foregoing reasons, this petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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October Term, 1969

No. 450

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion of the United States Court of Appeals for the District of Columbia Circuit	A1
Judgment of the United States Court of Appeals for the District of Columbia Circuit	A27
Decision and Order of the Federal Communications Commission	A30

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,106

GENERAL TELEPHONE COMPANY OF CALIFORNIA, et al., *Appellants,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

STORER BROADCASTING COMPANY, TELEPROMPTER CORPORATION, NATIONAL CABLE TELEVISION ASSN., INC., UNITED STATES OF AMERICA, *Intervenors,*

No. 22,112

UNITED INTER-MOUNTAIN TELEPHONE COMPANY, et al., *Appellants,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

STORER BROADCASTING COMPANY, TELEPROMPTER CORPORATION, et al., STERLING INFORMATION SERVICES, LTD., NATIONAL CABLE TELEVISION ASSN., INC., UNITED STATES OF AMERICA, *Intervenors,*

No. 22,113

UNITED TELEPHONE COMPANY OF OHIO, et al., *Appellants,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

STORER BROADCASTING COMPANY, WARRENSBURG CABLE, INC., TELEPROMPTER CORPORATION, et al., STERLING INFORMATION SERVICES, LTD., NATIONAL CABLE TELEVISION ASSN., INC., UNITED STATES OF AMERICA, *Intervenors,*

No. 22,116

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, et al., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents,*

TELEPROMPTER CORPORATION, INC., NATIONAL CABLE TELEVISION ASSN., INC., STORER BROADCASTING COMPANY, CITY OF NEW YORK, COX-COSMOS, INC., *Intervenors,*

No. 22,143

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents,*

TELEPROMPTER CORPORATION, et al., NATIONAL CABLE TELEVISION ASSN., INC., STORER BROADCASTING COMPANY, *Intervenors.*

On Appeals from and on Petitions to Review a Decision and Order of the Federal Communications Commission

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Decided April 30, 1969

Before: BURGER, WRIGHT and ROBINSON, *Circuit Judges.*

BURGER, *Circuit Judge:* Petitioners and Appellants seek review to vacate a Decision and Order of the Federal Communications Commission under which the Commission determined that a certificate of public convenience and neces-

sity was required for the construction of distribution facilities to provide channel service to community antenna television systems, commonly called CATV. Petitioners and Appellants are operating telephone companies and their corporate parents, the American Telephone and Telegraph Company, General Telephone System, and United Utilities, Inc. For convenience all parties challenging the Commission's action will be referred to as "Petitioners."

(1) Background

The Commission held that Section 214(a) of the Communications Act of 1934, 47 U.S.C. § 214(a) (1962)[1] grants the Commission jurisdiction over common carrier facilities used to provide local distribution channel service to CATV operators transmitting broadcast signals from another state, notwithstanding that the particular distribution facilities are located within the boundaries of a single state. The Petitioners contended the facilities were intrastate and local in nature and hence not subject to the certification requirements of Section 214(a).

The Commission order directed the companies to file applications for construction certificates for all CATV channel service construction then in process and to cease and desist from further construction, and from the operation of existing facilities (with certain exceptions and qualifications) until certificates issued.

A CATV television system consists of three basic components:

(a) the receiving apparatus which picks up, by means of high antennae or microwave transmission, signals transmitted by television and FM radio;

(b) the "headend apparatus which converts, modifies and modulates the signal by electronic equipment so

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[1] For the full text of Section 214(a) see note 11, *infra*.

that the signal received can be transmitted along a coaxial cable; and

(c) the coaxial cable distribution system which carries the converted signal to the premises of the CATV subscriber.

This third component (c) consists of three parts: the trunk or "feeder" coaxial cable which begins at the headend and carries the signal on the first leg of its journey, the distribution cables which carry the signal from the "feeder" lines to the immediate vicinity of the subscriber, and the "droplines" which carry it from the distribution cable to the terminal block on the subscriber's premises.[2]

Many CATV operators have constructed their own facilities for reception and distribution and the Commission does not assert common carrier jurisdiction over such systems. Others run their distribution cable over existing poles of utility systems by private contract with that utility. Neither of these types of operations involves a common carriage. Other CATV operators contract with a telephone system to provide the entire channel service distribution which carries the signal from the headend to the subscriber's home. In this proceeding the Commission considered only this latter mode of distribution by which the Petitioners supplied channel service transmission.

(2) Commission Proceedings

In April 1966, the Commission initiated a proceeding and directed the operating companies of the General Telephone System and Bell System to file tariffs covering CATV channel distribution facilities. Bell and General did so under protest and a petition for reconsideration was

---

[2] A final "cable" is then run from the terminal block to the subscriber's television set.

The coaxial cable utilized by the carriers to provide the service can simultaneously carry 12 television channels at VHF frequencies and the entire FM radio band.

denied.[3] In October 1966, the Commission initiated an inquiry into the lawfulness of tariffs filed by General Telephone Company of California.[4] Thereafter, similar pro-

[3] Common Carrier Tariffs for CATV systems, 4 F.C.C. 2d 257 (1966). In reaffirming its jurisdictional base for requiring the filings, the Commission relied upon Section 202(b), 47 U.S.C. § 202(b) (1962), and this court's decision in Idaho Microwave, Inc. v. FCC, 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965). The Commission also explained:

> A.T.&T. claims that the CATV operator performs certain conditioning and intervening procedures before the TV signals are further transmitted over the service in question. However, no claim is made that there is any significant interruption of the continuous flow of the signals from the TV station to the home viewer or that the program material transmitted by the TV station is materially different from the program material received by the home viewer from such station.
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> As we have heretofore stated, we think it clear that we are dealing with the regulation of tariffs for interstate communication service.
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> 14. It is true, as argued by A.T. & T., that the Commission has disclaimed tariff regulatory jurisdiction over CATV operators. However, such disclaimer followed from our finding that CATV operators are not engaged as communication common carriers within the contemplation of the Communications Act and that therefore such operators are beyond the reach of section 202(b) of the act. We are unable to make any such disclaimer in the case of telephone companies which furnish channels of communication to CATV operators, for the provision of such service is clearly a common carrier undertaking. Thus, the short answer to A.T. & T.'s policy arguments is that Congress has supplied the controlling policy guidance in section 202(b) of the act, recognizing, as it does, that there is a need for regulatory consideration by the central Federal agency of this type of activity by a common carrier, linked as it is with broadcasting.

4 F.C.C. 2d at 259-60.

[4] California Water and Tel. Co., 5 F.C.C. 2d 229 (1966). California Water and Telephone was subsequently merged with General Telephone Company of California and the latter was substituted as a party to the proceedings.

ceedings were initiated as to the operating subsidiaries of Bell,[5] General, and United Utilities, Inc.[6] These proceedings were expanded to include not only questions of the lawfulness of tariffs, but also the applicability of Section 214 of the Communications Act. By Order adopted January 11, 1967, all the above proceedings were consolidated for hearing.[7]

Subsequently, in Orders adopted March 29, 1967 and released April 3, 1967, the Commission deleted the Section 214 issues from the above-mentioned consolidated hearings[8] and initiated a separate consolidated proceeding to hear these issues.[9] This action was taken in response to allegations by General and California that insofar as the proceedings dealt with Section 214 matters, they were adjudicatory in nature and required the more formal procedural strictures of adjudicatory determinations. The Commission reasoned that in addition to resolving the purely legal questions, the Section 214 "issues contemplate that the Commission may take specific remedial actions, including the issuance of cease and desist orders, against individual carriers on the basis of the evidence adduced." 7 F.C.C. 2d at 572. Therefore, the Section 214 questions were excised and designated for separate hearing on the following issues:

> (a) Whether (with respect to the Bell System companies) the requirements of section 214 of the act and part 63 of our rules implementing that section have been met as to the facilities used to offer channel service under the aforesaid tariffs and, if not, what action, if any, the Commission should take with respect thereto;

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[5] The Associated Bell Systems Cos., 5 F.C.C. 2d 357 (1966).

[6] The General Tel. System, *et al.*, 6 F.C.C. 2d 434 (1967).

[7] California Water and Tel. Co., *et al.*, 6 F.C.C. 2d 440 (1967).

[8] California Water and Tel. Co., *et al.*, 7 F.C.C. 2d 571 (1967).

[9] California Water and Tel. Co., *et al.*, 7 F.C.C. 2d 575 (1967).

(b) Whether (with respect to the non-Bell System companies) any of the respondents are subject to the requirements of section 214 of the act and part 63 of our rules implementing that section and, if so, whether these requirements have been met as to the facilities used to offer CATV channel service under the aforesaid tariffs and what action, if any, the Commission should take with respect thereto.

Following the evidentiary hearing and the Examiner's certification of the record pursuant to Section 409(a) of the Act the Commission heard oral argument *en banc*, and its Decision and Order were released on June 26, 1968. *General Tel. Co. of California, et al.*, 13 F.C.C. 2d 448 (1968).[10] Essentially, the Commission found that the CATV channel service furnished by the carriers constituted "a

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[10] The Commission's view of the issues raised are:

(1) whether the channel service offerings relate to common carrier communications service undertakings; (2) whether the intelligence transmitted or to be transmitted by the telephone companies are interstate communications subject to the Commission's jurisdiction; (3) whether the construction under consideration, which does not cross a state boundary, is purely an intrastate line and therefore exempt under Section 214(a)(1) from the certification requirements or is part of an interstate line; (4) even if part of an interstate line, whether the construction relates to facilities which are "local, branch, or terminal lines not exceeding ten miles in length" and therefore exempt pursuant to Section 214(a)(2) of the Act; and (5) whether the service offered in each of the several tariffs is a "telephone exchange service" within the contemplation of Section 221(b) of the Act and therefore not subject to Commission jurisdiction. On behalf of those carriers which heretofore have been classified as "connecting carriers" pursuant to the provisions of Section 2(b)(2) of the Act, the contention is advanced that Section 214(a) is inapplicable to them even if determined to be applicable to the "fully subject" carriers.

13 F.C.C. 2d at 453-54 (1968).

common carrier undertaking" and that Section 214 certificates of public convenience and necessity were required for the construction of the channel distribution systems employed in providing this interstate communications service.[11] The Commission also determined that the service

[11] Section 214(a), 47 U.S.C. § 214(a) (1962), provides:

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

provided by these carriers was not "intrastate communication service" within the Section 2(b)(1) exemption.[12] In addition the Commission determined that the construction in question did not fall within the exemptions of Section 214(a)(1) covering "a line within a single state unless such line constitutes part of an interstate line." Likewise, the Section 214(a)(2) exemption covering "local, branch, or terminal lines not exceeding ten miles in length," and the Section 221(b) provision exempting "services, facilities . . . for or in connection with . . . telephone exchange service" were found to be inapplicable.[13] The Commission also rejected the contentions of those petitioners which claimed that their prior classification as "connecting carriers" exempted them from its regulatory authority pursuant to Section 2(b)(2) of the Act.[14]

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[12] Section 2(b), 47 U.S.C. § 152(b) (1962), provides in relevant part:

> (b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . .

[13] Section 221(b), 47 U.S.C. § 221(b) (1962) provides:

> (b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

[14] For the text of Section 2(b)(2), 47 U.S.C. § 152(b)(2) (1962), see note 12, *supra*.

Pursuant to these findings the Commission directed the operating telephone companies of Bell, General, and United to file applications for certificates of public convenience and necessity pursuant to Section 214 as respects all construction theretofore undertaken to provide channel service to CATV systems. The Commission also directed these parties to cease and desist from constructing additional facilities until certificates have been obtained, and to cease and desist from operating previously completed facilities until applications for certification had been filed and certain additional conditions had been met. These conditions varied to meet special problems of individual carriers and included references to the particular party's date of notice of the possible applicability of Section 214, the percentage of construction and expenditure up to the notice date, and the nature of the affiliation existing between the particular carrier and CATV operator.[15]

(3) Questions Presented

The basic and dispositive issue is whether the Communications Act vests in the Commission jurisdiction over channel transmission service and facilities of telephone companies constructed to carry TV and FM radio signals by wire between a CATV antenna (or microwave received) and the subscribers, when the reception and transmission facilities are entirely within one state and when they are constructed to provide transmission service to CATV oper-

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[15] In a Memorandum Opinion and Order adopted July 26, 1968, the Commission partially stayed the provisions of its cease and desist orders pending review in this court. Those provisions relating to the construction of new facilities or the operation of facilities fully or partially constructed but not operational on the date of the Commission's principal opinion were not stayed; all other provisions relating to CATV channel distribution facilities constructed and in operation on or before June 26, 1968, were stayed. General Tel. Co. of Cal., *et al.*, 14 F.C.C. 2d 170 (1968).

ators carrying signals which originate from TV and FM broadcasters in another state.

An additional question is, assuming such jurisdiction exists, is the Commission authorized to enter a cease and desist order under Section 312.

Some hint of the magnitude and significance of the problems raised on this appeal is suggested by the growth of CATV in a brief period and the extent of the involvement of the telephone carriers in providing distribution facilities and service to CATV operators. By 1967 six of the 33 operating companies of the General Telephone and Electronics Corporation were involved in eight channel services, and other construction was contemplated; other General operating companies were directly engaged in CATV operation. A wholly owned General subsidiary engaged in CATV is a customer in 10 of the distribution systems of General carriers; this subsidiary owned 36 CATV systems and franchises.

Bell System Companies by 1967 were supplying channel transmission services to 178 separate communities identified in the record. United Utilities, parent of the United operating telephone companies, supplied channel service in 31 communities; in all but one of these communities United Utilities is the sole or major stockholder in these CATV systems.

A summary of Petitioners' investment in channel service indicated that General has invested over $2,000,000 in ten communities; United, $800,000 in six communities; Bell, $1,360,000 in four communities: Bell's total investment cost in channel service systems is in excess of $43,000,000, and other telephone systems have also invested large sums. The projected future development is not indicated in the record but the amounts involved for the number of communities now being served suggest the magnitude of the potential in CATV distribution by common carriers.

(4) Nature of Services

The primary challenge to the Commission's action is that it has improperly asserted jurisdiction over intrastate activities. Such regulation, it is contended, transgresses the original congressional distinction between local and national activities, a dividing line which was drawn to achieve a balance between state and national regulation rather than to allow preemption of local control by comprehensive federal regulation. Great reliance is placed on the fact that the physical facilities of all but one of the common carrier lines used for CATV distribution service are located within the boundaries of a single state [16] and on Section 2(b)(1) of the Act which provides in part:

> (b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply to or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations *for or in connection with intrastate communication service by wire or radio of any carrier* . . . .

47 U.S.C. § 152(b) (1964) (emphasis added).

The Petitioners insist that service wholly within a single state, when there is no common carriage *across* state lines, is "intrastate service," even though the subject matter of that service—the interstate broadcast signal—may itself be regarded as interstate communication. In their view the crucial fact is *the character of the common carrier service and facilities involved.* This, and not the transmission itself, it is argued, should determine whether a communication service is intrastate or interstate in character; Peti-

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[16] The Commission did not question the intrastate physical location of the facilities in arriving at its determination. It listed United Telephone Company of the Northwest as the only operating company with cable facilities crossing a state boundary. This determination was not challenged. 13 F.C.C. 2d at 455 n.15.

tioners insist that it is error for the Commission to consider interstate communication as the functional equivalent of interstate communication *service*.

In evaluating this contention the Commission placed chief reliance on what it considered to be an examination of the actual service which the carriers perform in relation to the total transmission process which carries the broadcast signal from the broadcaster to the television set of the individual viewer:

> The controlling facts here are that the cable facilities furnished by the telephone companies are links in the continuous transmission of the signals from the point of origin to the set of the viewer, and the intelligence received by the viewer is essentially the same as that transmitted by the broadcaster. *Irrespective of the location of its physical facilities, the common carrier which thus participates as a link in the relay of television signals is performing an interstate communications service.*

13 F.C.C. 2d at 455 (1968) (emphasis added).

At the time of the enactment of the Communications Act, Congress could not and indeed did not try to anticipate all of the developments which might occur.[17] Fundamentally it viewed the "air waves" as a public resource to be utilized and regulated in the public interest. Basic to its approach was that radio broadcasting was subject to federal jurisdiction without regard to transmission over state lines in the traditional interstate commerce sense.

Over the years, the Commission has been required to meet new problems concerning CATV and as cases have reached the courts the scope of the Act has been defined, as Congress contemplated would be done, so as to avoid a

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[17] *Cf.* Fortnightly Corp. v. United Artists, 392 U.S. 390 (1968).

continuing process of statutory revision.[18] To do otherwise in regulating a dynamic public service function such as broadcasting would place an intolerable regulatory burden on the Congress—one which it sought to escape by delegating administrative functions to the Commission.

Our evaluation of the Commission's interpretation of the scope of its jurisdiction must take into account the Act's broad purposes and objectives. We cannot ignore specific exemptions and limitations which narrow its regulatory powers, but neither can we overlook that Congress sought to establish a pervasive jurisdiction over broadcasting. The Act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole.

Petitioners point out that Section 2(a) of the Act is limited "to all interstate and foreign communication by wire or radio . . ." and from this argue that intrastate communication is thereby necessarily excluded. The relationship of Section 2(a) and 2(b)(1) is suggested as emphasizing the exclusion of communication facilities within one state.

In *Idaho Microwave, Inc.* v. *FCC,* 122 U.S. App. D.C. 253, 352 F.2d 729 (1965), we dealt with the Commission's power to regulate, by use of conditions on a license, microwave communication facilities located entirely within the State of Idaho, but used to carry signals from Utah stations to a CATV system in Burley, Idaho. Our holding in pertinent part was:

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[18] *See* American Broadcasting Co. v. FCC, 89 U.S. App. D.C. 298, 304, 191 F.2d 492, 498 (1951), *quoting* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940), where we explained:

> Underlying the [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.

> . . . The Burley facility is used as a link in the continuous transmission of television signals from Salt Lake City to Burley, Idaho; there is no interruption in the flow of the signals, as it is practically instantaneous. Thus, though Idaho Microwave's physical facilities are located within Idaho, it performs an interstate communication service when it takes part in the transmission of signals from Utah to Idaho.

Id. at 256, 352 F.2d at 732, *citing, Ward* v. *Northern Ohio Tel. Co.*, 300 F.2d 816 (6th Cir.), *cert denied*, 371 U.S. 820 (1962); *see Pacific Teletronics, Inc.*, 37 F.C.C. 1163 (1964).

Similarly in *California Interstate Tel. Co.* v. *FCC*, 117 U.S. App. D.C. 255, 328 F.2d 556 (1964), we found no difficulty in affirming a Commission determination that broadcast signals from Pasadena to Goldstone, both within California, for relay to spacecraft were a part of "foreign commerce" and subject to federal jurisdiction:

> It is true that the only earth stations involved in this system are at Goldsone and Pasadena, both in California. The record shows, however, that the purpose of the system is to provide communication between spacecraft and Pasadena, the "bouncing through" Goldstone being practically instantaneous. Voice communications between Goldsone and Pasadena will be subordinate to data, and will be used primarily to coordinate the system and to check on its operating characteristics. Being merely adjuncts to the transmission of signals between Pasadena and spacecraft, the voice and data transmissions between Pasadena and Goldstone will be, as the California Commission said, "secondary and subsidiary to the primary use of radio communication and data transmission in interstate or foreign commerce."

Id. at 259, 328 F.2d at 560.

Petitioners point out that the Bell System operating companies have held out common carrier channel service for local service to CATV operators since 1959, but that the Commission asserted no jurisdiction until the 1966 proceedings. Prior to 1966 such common carrier service was subject only to local and state agencies and tariffs for such service had been filed where required. It is also correct that in 1959 the Commission expressed the view that although CATV related to interstate communication it did not contemplate regulation of such systems. However, the explosive growth of CATV led the Commission to alter its view, particularly after the Congress failed to adopt amendments which would have clarified the status of CATV. See Second Report & Order, 2 F.C.C. 2d 725, 738 n. 15.

An early step was to regulate the activities of common carrier microwave facilities serving CATV systems. In *Carter Mountain Transmission Corp.* v. *FCC,* 116 U.S. App. D.C. 93, 321 F.2d 359, *cert. denied,* 375 U.S. 951 (1963), we reviewed a Commission decision which had denied an application by a common carrier to construct a microwave radio communication system to serve a CATV operator. The Commission action was based on the finding that a grant would not serve the public interest because of the adverse impact on a local television station. In challenging the Commission's determination, the carrier asserted that the Commission had erroneously applied principles of "radio broadcast law" to a situation involving "common carrier licensing." This challenge was in part based upon the proposition that the Communications Act contemplates the regulation of common carriers "in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission." *Id.* at 96, 321 F.2d at 362.

We rejected this stilted interpretation of the Act, recognizing the vast difference between "questions of competitive injury in the transportation field" and "questions of public injury in the field of communications." *Id.* In doing so,

we emphasized the soundness of allowing the Commission to consider its total regulatory responsibilities when dealing with problems within a particular area of its jurisdiction:

> Here the Federal Communications Commission is charged with the duty of regulating not only common carriers by radio but broadcasters of television programs. It cannot let its decisions in the radio carrier field interfere with its responsibilities in the television broadcasting field. In both fields, it must "make available, so far as possible, to all the people of the United States," adequate and efficient service.

Id.

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), the Supreme Court had occasion to review the brief but spectacular history of CATV growth. Justice Harlan, for the Court, noted that in 1962, the Commission had reconsidered and re-evaluated the significance of CATV and the scope of the Commission's responsibilities, and it concluded that "the likelihood or probability of (CATV's) adverse impact upon potential and existing services has become too substantial to be dismissed." First Report & Order, 38 F.C.C. 683, 713-14. The Second Report & Order, 2 F.C.C. 2d 725, followed, in which the Commission determined that the Act confers regulatory authority over all CATV systems. In exercise of this comprehensive jurisdiction the Commission restricted the importation by CATV of distant signals into the 100 largest TV markets. *Id.* at 781-785.

Addressing the issues raised in *Southwestern Cable*, Justice Harlan then said:

> We must first emphasize that questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court. The issues in these cases are only two:

whether the Commission has authority under the Communications Act to regulate CATV systems, and, if it has, whether it has, in addition, authority to issue the prohibitory order here in question.

The Commission's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended. The Act's provisions are explicitly applicable to "all interstate and foreign communication by wire or radio . . . ." 47 U.S.C. § 152(a). The Commission's responsibilities are no more narrow: it is required to endeavor to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ." 47 U.S.C. § 151. The Commission was expected to serve as the "single Government agency" with "unified jurisdiction" and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." It was for this purpose given "broad authority." As this Court emphasized in an earlier case, the Act's terms, purposes, and history all indicate that Congress "formulated a unified and comprehensive regulatory system for the (broadcasting) industry." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137.

Respondents do not suggest that CATV systems are not within the term "communication by wire or radio." Indeed, such communications are defined by the Act so as to encompass "the transmission of . . . signals, pictures, and sounds of all kinds," whether by radio or cable, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. §§ 153(a), (b). These very general terms amply suffice to reach respondents' activities.

> Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that "is not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 279.

392 U.S. at 167-69 (footnotes omitted).

As we view the record now before us and consider it in light of our own holdings and the relevant holdings of the Supreme Court it seems clear that as the outlines of the CATV problem emerged the Commission acted within the scope of the Act and consistently with the broad purposes of the Act by treating its responsibilities as comprehensive and pervasive. Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority; fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication. The Supreme Court aptly characterized the functional aspect of the CATV systems as an "essentially uninterrupted and properly indivisible" stream of communication.

The Commission has construed its own statutory grant after much study and indeed not without periods of doubt and reservation as embracing all links, including strictly intrastate links, as being part of the interstate transmis-

sion. Its interpretation of its grant and its application are entitled, of course, to great deference. The Petitioners have, by choice, inserted themselves as links in this indivisible stream and have become an integral part of interstate broadcast transmission. They cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission. *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mtge. Co.*, 289 U.S. 266 (1933).

(5) Applicability of Exemptions Under Section 214

Notwithstanding the Commission's determination that Petitioners are engaged in providing interstate communication services, the Petitioners assert that various specific provisions of the Act, apart from their claims of the intrastate character of their facilities, exempt them from Commission jurisdiction. Having previously rejected their major premise, our consideration of these arguments has been facilitated.[19]

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[19] The carriers assert two exemption claims which we feel do not merit extended discussion.

The first rests on Section 221(b)'s exclusion of facilities "for or in connection with . . . telephone exchange service." See note 13, *supra*, for the full text of Section 221(b). On this point, we agree with the Commission's summary rejection of this contention as "inconsistent with the plain meaning of the words used." Section 3(r) of the Act, 47 U.S.C. § 153(r) (1964), defines "telephone exchange service" as:

> service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

Clearly, CATV channel distribution service does not contemplate furnishing subscribers with "intercommunicating service" of the type usually identified with a telephone exchange.

A second claim of exemption rests on Section 2(b)(2)'s exclusion of carriers "engaged in interstate or foreign communication solely

Petitioners contend that the cable distribution systems employed by all but one operating company [20] are exempt by Section 214(2)(1)'s exclusion of "a line within a single State unless such line constitutes part of an interstate line" because none of their facilities cross a state boundary. The Commission met this allegation directly by relying on the Section 214(a) definition of "line" as "any channel of communication established by the use of appropriate equipment." The Commission did not read Section 214(a)(1) to mean that an intrastate common carrier line had to be connected to an interstate *common carrier line* before it could be subjected to certification requirements.

Given the already articulated interstate nature of the service being provided, we cannot conclude that the Commission abused its authority to construe these remedial provisions in a way to effectuate the ultimate regulatory scheme of the Act.[21] These carriers are an integral component in the indivisible dissemination system which forms

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through physical connection with the facilities of another carrier . . . ." See note 12, *supra*, for the full text of Section 2(b)(2). The Commission decided only that the *CATV channel service* provided by the connecting carriers in question is not exempted from Section 214(a)'s certification requirements. This ruling in no way affected their status as connecting carriers with respect to their other interstate activities which continue to fall wihin the legitimate intendment of § 2(b)(2). We agree with the Commission's view that the "character of the communication" which prompts the construction is the pertinent consideration. *See Ward* v. *Northern Ohio Tel. Co., supra.* The exclusion embodied in Section 2(b)(2) was meant to protect State jurisdiction over local telephone facilities which could place interstate calls through their connection with major toll lines; this interstate facet of the company's operation was incidental to its primary local service. To characterize the interstate connections of a CATV channel distribution system as "incidental" to any other function it may perform would be at best a myopic view of its true activities.

[20] See note 16, *supra.*

[21] *See* note 18, *supra.*

an interstate channel of communication from the broadcaster to the viewer. As such, they are reasonably characterized as a "part of an interstate line" within the language of Section 214(a)(1).

The correctness of this analysis becomes even more evident when the alternative offered by the carriers is considered. As noted previously, the Commission has jurisdiction over broadcasters and CATV operators. Likewise, the Commission has jurisdiction over the construction and alteration of interstate common carrier facilities pursuant to the general provisions of Section 214(a). Here, the channel distribution systems are provided by common carriers to already-regulated CATV operators who in turn are merely relaying the signals of fully-regulated broadcasters. Therefore, coaxial cable construction by these operating telephone companies directly affects two types of operations already subject to Commission regulation and is provided by a party otherwise covered by Title II common carrier provisions. To give the Act the overly restrictive interpretation urged by Petitioners would be to prevent the Commission from employing the regulatory devices which have been established for effective common carrier control—a particularly sterile result when the carrier activity is augmenting the operations of parties which are the particular concern of the Commission's regulatory responsibility. *See Carter Mountain, supra.* We have previously noted that the Commission's regulatory and enforcement powers should not be artificially fragmented or compartmentalized when the result would be to frustrate a comprehensive, pervasive regulatory scheme.[22]

The other major basis for the carriers' claim of exemption is Section 214(a)(2)'s exclusion of "local, branch, or terminal lines not exceeding ten miles in length." In dis-

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[22] *See* Buckeye Cablevision, Inc. v. FCC, 128 U.S. App. D.C. 262, 267, 387 F.2d 220, 225 (1967). *See also* discussion in part 6, *infra.*

missing this assertion, the Commission never reached the ten-mile-length limitation because it determined that the establishment of these channel distribution systems constituted construction of "'main' communication lines which should have been certificated." This finding rested on the conclusion that the concept of "local, branch, or terminal" lines is not consistent with the proposed construction of facilities which will involve "new construction by the telephone companies in order to provide new customers with a type of service significantly different from that theretofore provided in said communities." 13 F.C.C. 2d at 459.

This provision of Section 214(a) has not been previously construed, and the legislative history does not furnish dispositive guidance. We therefore are confronted with the well-accepted rule that the administrative agency should be given deference in its interpretation of the statutory scheme it is charged with administering.[23] This is particularly appropriate when the reviewing court preliminarily views the interpretation as one directed at achieving the reasonably authorized purposes of the legislation in question.[24]

In this instance, we are persuaded that the Commission has focused on the central purpose of this exemption. Section 214(a)(2) was meant to permit nonsubstantial improvements or extensions for existing carrier facilities without calling for a continuous stream of burdensome applications for Commission approval. *Cf. Texas & Pac. Ry. Co.* v. *Gulf, Colo. & S.F.Ry.Co.*, 270 U.S. 266 (1926).[25]

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[23] *E.g.*, Udall 1. Tallman, 380 U.S. 1 (1965); Unemployment Comp. Comm'n v. Aragon, 329 U.S. 143 (1946); *see* Philadelphia Television Broadcasting Co. v. FCC, 123 U.S. App. D.C. 298, 359 F.2d 282 (1966).

[24] *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

[25] *See* also 78 Cong. Rec. 10,314 (1934) (remarks of Rep. Rayburn); 78 Cong. Rec. 10,987 (1934) (remarks of Rep. Rayburn).

It is reasonable to assume that Congress was not troubled by the prospect of a local telephone company running an extension line to a cluster of houses in a new subdivision near existing facilities It is quite another matter to suggest that it meant to exempt a carrier's efforts to install an entire network consisting of "trunk," "distribution," and "dropline" cables to provide TV service via CATV to an area that has theretofore been without such broadcast distribution facilities.

We think that the Petitioners misconstrue the purpose of the exemption when they read its provision to encompass the *initial construction* of a distribution component capable of carrying broadcast signals to a substantial number of viewers. Without deciding the point, we may assume that they would be more comfortably within the intendment of Section 214(a)(2)'s exemption were they proposing the nonsubstantial extension of *existing channel service facilities* of the type now under consideration. Instead, they have sought to force the camel through the needle's eye by arguing that an exemption providing for improvements and extensions can be construed to allow the initial construction of facilities. The Commission's rejection of that proposition seems entirely sound to us.

(6) The Commission's Cease and Desist Orders

The Petitioners also challenge the Commission's resort to the cease and desist provisions of Section 312(b)[26] as a means of arresting the continued construction and opera-

[26] Section 312(b), 47 U.S.C. § 312(b) (1962), provides:

> (b) where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 of Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

tion of certain channel distribution systems.[27] The thrust of their argument is that Section 214(c)[28] embodies the Commission's exclusive method of enforcement to thwart abuses of the certification provisions. Section 214(c) allows the Commission to seek a court injunction to prevent construction or operation until the requirements of Section 214 are satisfied. This reasoning is based on the proposition that Section 312(b), which was inserted in Title III when the Act was amended in 1952, is completely inapplicable to the provisions of Title II dealing with the regulation of common carriers.

The direct answer to this analysis is contained in the language of the two sections. Initially, Section 312(b) makes clear that it is directed at "*any person* . . . [who]

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[27] As previously noted, the Commission stayed portions of its Order as respects certain carriers. See note 15, *supra*.

[28] Section 214(c), 47 U.S.C. § 214(c) (1962), provides:

> (c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

has violated or failed to observe *any of the provisions of this Act* . . . [or] *any rule or regulation of the Commission authorized by this Act* . . . ." The pervasive application of the language employed in Sections 312(b)(2) and 312(b)(3) is suggested by Section 312(b)(1)'s narrower reference to "any person [who] has failed to operate substantially *as set forth in a license* . . . ." It seems that when the drafters intended to focus on licensees, they had no problem doing so.

Nor does the clear language of Section 214(c) suggest its exclusivity. The section employs *permissive* terminology in that "construction . . . operation . . . contrary to the provisions of this section *may be enjoined* . . . ." Such language does not usually imply that no other remedy is contemplated. Moreover, in addition to the Commission, Section 214(c)'s enforcement techniques are available to the United States, a state or state commission, or any party in interest. This too would suggest that it was not meant to be a remedy particularly adapted to the needs of an expert regulatory body and consequently a remedy that could serve as the administrative body's sole enforcement machinery in this area.

The contention that Section 312(b)'s enforcement techniques are restricted in applicability to those parties particularly subject to the general regulatory provisions of Title III also runs contrary to the reasoning of recent decisions emphasizing the flexibility which an expert regulatory agency must possess if it is to keep pace with a still burgeoning industry. We noted in *Buckeye Cablevision, Inc.* v. *FCC*, 128 U.S. App. D.C. 262, 267 n. 19, 387 F.2d 220, 225 n. 19 (1967), that we were not disposed to the suggestion that "the Commission's powers are rigidly compartmentalized into 'licensing' and 'public utility regulation' functions." In *Buckeye*, this court upheld a cease and desist order which the Commission had issued against a CATV operator, a member of a class which the Commis-

sion,[29] this court,[30] and the Supreme Court[31] have recognized as not readily encompassed within the clear language of either Title II or Title III. The interest there respected was one of preserving the Commission's capacity to respond to changes which necessarily emanate from a dynamic industry. *See Southwestern, supra; Valley Vision, Inc.* v. *FCC*, 399 F.2d 511 (9th Cir. 1968). Were the language of Section 312(b) not so dispositive of the propriety of the Commission's action, this consideration itself might well be.

Our review satisfies us that the Decision and Order of the Commission should be

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1968

No. 22,106

GENERAL TELEPHONE COMPANY OF CALIFORNIA, et al.,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

STORER BROADCASTING COMPANY, TELEPROMPTER CORPORATION, NATIONAL CABLE TELEVISION ASSN., INC., UNITED STATES OF AMERICA, *Intervenors,*

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[29] Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958).

[30] Philadelphia Television Broadcasting Co. v. FCC, 123 U.S. App. D.C. 298, 359 F.2d 282 (1966).

[31] United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

No. 22,112

UNITED INTER-MOUNTAIN TELEPHONE COMPANY, et al., *Appellants,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

STORER BROADCASTING COMPANY, TELEPROMPTER CORPORATION, et al., STERLING INFORMATION SERVICES, LTD., NATIONAL CABLE TELEVISION ASSN., INC., UNITED STATES OF AMERICA, *Intervenors,*

No. 22,113

UNITED TELEPHONE COMPANY OF OHIO, et al., *Appellants,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

STORER BROADCASTING COMPANY, WARRENSBURG CABLE, INC., TELEPROMPTER CORPORATION, et al., STERLING INFORMATION SERVICES, LTD., NATIONAL CABLE TELEVISION ASSN., INC., UNITED STATES OF AMERICA, *Intervenors,*

No. 22,116

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, et al., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents,*

TELEPROMPTER CORPORATION, INC., NATIONAL CABLE TELEVISION ASSN., INC., STORER BROADCASTING COMPANY, CITY OF NEW YORK, COX-COSMOS, INC., *Intervenors,*

No. 22,143

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*,

TELEPROMPTER CORPORATION, et al., NATIONAL CABLE TELEVISION ASSN., INC., STORER BROADCASTING COMPANY, *Intervenors*.

On Appeals from and on Petitions to Review a Decision and Order of the Federal Communications Commission

Before: BURGER, WRIGHT and ROBINSON, *Circuit Judges*.

Judgment

These cases came on to be heard on the record from the Federal Communications Commission, and were argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the Decision and Order of the Federal Communications Commission dated June 26, 1968, is hereby affirmed.

Per Curiam

For the Court:

NATHAN J. PAULSON
Clerk

Dated: April 30, 1969.
Opinion by Circuit Judge Burger.

A30

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

DOCKET NO. 17333

In the Matter of

GENERAL TELEPHONE COMPANY OF CALIFORNIA (formerly California Water and Telephone Company) THE ASSOCIATED BELL SYSTEM COMPANIES, THE GENERAL TELEPHONE SYSTEM AND UNITED UTILITIES, INC. COMPANIES

Applicability of Section 214 of the Communications Act with Regard to Tariffs for Channel Service for Use by Community Antenna Television Systems

Decision

Adopted June 25, 1968; Released June 26, 1968

Commissioner Lee for the Commission: Commissioner Loevinger took no part in the decision of this case.

1. This adjudicatory proceeding concerns one phase of a controversy between the operators of community antenna television systems (CATV) and the major communications common carriers which has presented numerous problems to the Commission for resolution. A brief recitation of the background facts leading up to this proceeding is essential to an understanding of the matters now before us for consideration.

2. A CATV system is a facility which receives television signals and FM radio signals off the air by means of high antennas or by microwave transmission, amplies the signals, and distributes such signals by coaxial cable to the

premises of its subscribers who pay a fee for the service.[1] The system consists of a number of connecting sections which may be characterized as the reception, headend, and distribution systems. At the beginning of the system are located the towers, antennas, microwave receivers, and other equipment necessary to receive the program material. The headend section consists of the electronic equipment used to convert, modify and modulate the signals bearing the intelligence received at the antenna before traveling into the wire distribution system. Generally, the headend equipment is located in a building adjacent to the tower, although this is not essential. The distribution system consists of feeder or trunk lines which originate at the headend and may be branched repeatedly to reach different sections of the system; the smaller distribution cables which carry the signal to the immediate vicinity of the subscriber; and the "drop" wires which carry the signal from the distribution cable to a terminal block on the premises of the individual subscriber. The final link in the system is the cable extending from the terminal block to the television set of the subscriber.

3. In some instances the distribution system is provided by the CATV owner who either constructs all of the necessary facilities or strings his cable on the poles of a utility company for which a rental fee is paid pursuant to a pole line attachment. In other cases, the telephone company serving the CATV community provides the channel service transmission system. While in some instances the telephone company provides the headend equipment, it generally provides service only from the headend to the premises of the subscriber. We are concerned in this proceeding only with channel service offerings by telephone companies to CATV systems, not with the distribution system constructed by the CATV owner or provided pursuant to pole line attachment arrangements.

[1] See Section 74.1101(a) of the Rules.

4. On April 6, 1966, the Commission sent letters to the American Telephone and Telegraph Company (AT&T) and General Telephone and Electronics Service Corp. (General) directing the operating telephone companies of the Bell System and the General Telephone System to file tariffs for local distribution facilities furnished for the use of CATV systems. Upon petition of the carriers, reconsideration was denied. *Common Carrier Tariffs for CATV Systems,* 4 FCC 2d 257, adopted June 22, 1966, and released June 29, 1966. Therein the Commission held that the services offered constitute an interstate communications service, that the furnishing of channels of communication to CATV operators is "clearly a common carrier undertaking," and that the Commission has properly required the tariffs to be filed.

5. Pursuant to the Commission's orders, tariffs have been filed by thirty-four telephone companies of which eighteen are Bell operating companies, six are General, and ten are operating companies in the system of United Utilities, Inc. The Bell tariffs provide in general that they apply "to interstate channels or portions of interstate channels furnished within the operating territory" of the carrier for the "one-way transmission of broadcast television and FM radio program material" from a specified input point to a specified output point, the direction of which "may not be reversed." Nonexclusive service is offered for the "simultaneous transmission of a maximum of twelve (12) broadcast television signals" with routes and type of construction to be determined by the telephone company, the charge for which depends on the length of the feeder and distribution cable and the number (but not the length) of the drops at subscribers' premises. The Bell tariffs further state that no "connecting" or other carrier participates in furnishing the service offered. With minor variations in language and in the extent of the service

offered,[2] the offerings in the tariffs filed by General[3] are like those filed by Bell. Charges for the feeder and distribution cable are based on the length of the cable and those for "channel terminations" (apparently the same as "drops") on the number installed. The tariff provisions of United do not differ materially from the other two and the charges also are based on the length of cable and the number of drops.[4] Service is offered anywhere within the operating territories of each of the respondent carriers except that Southern Bell Telephone and Telegraph Company, General Telephone Company of California, and the United Companies of Arkansas, the Carolinas, Iowa, Missouri and Ohio, specify that CATV channel service will be provided within their local exchange areas. However, in no instance is the CATV distribution system interconnected with any telephone exchange facility or any telephone toll service facility.

6. On October 12, 1966, the Commission instituted an investigation in Docket No. 16928 into the lawfulness of the tariffs filed by General Telephone Company of California.[5] Like action was taken with respect to tariffs

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[2] Bell, upon request, will provide headend equipment but not all carriers do so. Some General tariffs offer headend equipment but the record does not disclose that such equipment has been provided in any of the distribution systems constructed by General to date.

[3] General Telephone Company of California uses somewhat different terminology in its tariff. Thus, it refers to "Wide Spectrum Services" which are offered in two categories, "Point-to-Point Service" and "Distribution Service." The charge for Point-to-Point Service is based on mileage and the charge for Distribution Service varies according to the number of service terminations at premises of CATV subscribers.

[4] Revised tariffs were filed by United on March 21, 1968, but these have not been considered in this proceeding.

[5] *California Water and Telephone Co.*, 5 FCC 2d 229, released October 13, 1966. At that time the carrier was California Water and Telephone Company. However, this corporation was subsequently merged with General Telephone Company of California and the latter was substituted as a party to this proceeding. FCC 67-1149, released October 23, 1967.

filed by operating subsidiaries of Bell in Docket No. 16943, on October 20, 1966;[6] and the operating subsidiaries of General and United in Docket No. 17098 on January 11, 1967.[7] In the latter two proceedings the Commission found that, in addition to the questions of lawfulness raised in Docket No. 16928, the tariffs raised questions as to the applicability of Section 214 of the Communications Act, and Part 63 of the Rules. In the Docket No. 17098 proceeding, inquiry was also directed into the extent of the Commission's jurisdiction over pole line attachment arrangements with CATV operators and, if it exists, how it should be exercised. The issues in Docket No. 16928 were broadened accordingly, and the three proceedings were consolidated for hearing.[8]

7. In view of the representations contained in a letter dated March 13, 1967, from subsidiaries of General, the Commission reviewed the status of the consolidated proceedings. It concluded that the proceedings involved adjudication within the meaning of Section 2(d) of the Administrative Procedure Act (5 USC 551) insofar as the issues concerning the applicability of Section 214 are concerned since, if applicable, the Commission proposed to take remedial action, including the issuance of cease and desist orders, against individual carriers on the basis of the evidence adduced. For this reason the Section 214 issues were deleted from the consolidated proceedings in Docket Nos. 16928, 16943, and 17098; and a separate adjudicatory proceeding in Docket No. 17333 was initiated for the purpose of hearing and determining the Section 214 issues.[9] In Docket No. 17333, the Commission designated

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[6] *The Associated Bell System Companies,* 5 FCC 2d 357, released October 21, 1966.

[7] *The General Telephone System, et al.,* 6 FCC 2d 434, released January 24, 1967.

[8] 6 FCC 2d 440 and 441, both adopted January 11, 1967, and released January 24, 1967.

[9] 7 FCC 2d 571 and 7 FCC 2d 575, both adopted March 29, 1967, and released April 3, 1967.

issues for hearing, and these are the only issues presently before us for consideration, as follows:

(a) Whether (with respect to the Bell System Companies) the requirements of Section 214 of the Act and Part 63 of our Rules implementing that section have been met as to the facilities used to offer channel service under the aforesaid tariffs and, if not, what action, if any, the Commission should take with respect thereto;

(b) Whether (with respect to the non-Bell System Companies) any of the respondents are subject to the requirements of Section 214 of the Act and Part 63 of our Rules implementing that section and, if so, whether these requirements have been met as to the facilities used to offer CATV channel service under the aforesaid tariffs and what action, if any, the Commission should take with respect thereto.

8. The Commission also called attention to the fact that the legal issues which had been designated included questions concerning the applicability of the exception in Section 214(a) for "local, branch, or terminal lines not exceeding 10 miles in length" and whether carriers claiming to be "connecting carriers" under Section 2(b)(2) of the Act are subject to the certificate requirements of Section 214 by virtue of furnishing channels of communication to CATV systems. In addition, all parties were placed on notice that, since these legal questions are under review, "any further construction or extensions of lines may be the subject of appropriate remedial action in this proceeding, including the issuance of cease and desist orders tailored to the particular factual situation." Due and timely execution of the Commission's functions was found to imperatively and unavoidably require that upon completion of the evidence, the Hearing Examiner not prepare a recommended decision but that he certify the record to the Commission for decision pursuant to Section 409(a) of the Act.

9. Prehearing conferences were held before Hearing Examiner Charles J. Frederick on April 24, 1967, and an oral argument on Storer Broadcasting's petition to intervene was held on May 11, 1967. The hearing commenced May 31, 1967, and hearings were subsequently held on June 1, 2, 5-9, 19, and 20, 1967. On July 11, 1967, a hearing conference was held to establish the procedure to be followed by reason of the Commission's Memorandum Opinion and Order (Docket No. 16931), FCC 67-745, released June 27, 1967, which authorized Warrensburg Cable, Inc. to introduce evidence on its complaint against United Telephone Company of Missouri in the Docket No. 17333 proceeding. The evidence was introduced through a stipulation which was made a part of the record on July 27, 1967. By Order, FCC 67M-1301, released August 1, 1967, the Hearing Examiner closed the record and by Order, FCC 67M-1421, released August 24, 1967, he certified the record to the Commission.[10]

10. Proposed findings of fact and conclusions of law and briefs in support thereof were filed on October 2, 1967, by each of the carriers, Bell, General, and United; by National Cable Television Association, Inc. (NCTA); jointly by Teleprompter Corporation, Manhattan Cable TV Service, Illinois-Indiana Cable Television Association, Michigan Cable Television Association, and West Virginia Community Television Association; jointly by New York State CATV Association and Community TV Association of New England; jointly by Pennsylvania Community Antenna Television Association, Inc., Ohio Cable Television Association, Inc., Texas CATV Association, Inc., and the Pacific Northwest Community TV Association, Inc.; by Warrensburg Cable, Inc.; by Storer Broadcasting Company; and by the Common Carrier Bureau. Briefs were also filed by the National Association of Regulatory Utility

[10] A motion to correct the transcript of hearing was filed by NCTA on September 5, 1967. No opposition to the motion has been received and it will be granted.

Commissioners (NARUC) and by the City of New York. A statement was filed by the CATV Task Force subscribing to the views of the Common Carrier Bureau. Reply briefs were filed on December 11, 1967. We heard oral argument, *en banc*, on February 26, 1968.[11]

The Applicability of Section 214

11. The legal issue presented in this proceeding is whether a certificate of public necessity and convenience pursuant to Section 214(a) of the Communications Act must be obtained by a telephone company before undertaking the construction of distribution facilities to provide channel service to a CATV ssytem. Section 214(a) provides:

> (a) No carrier shall undertake the construction of a new line or an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line

[11] Motions to correct the transcript of oral argument were filed by the CATV Task Force on March 4, 1968; by the Common Carrier Bureau on March 5, 1968; by United on March 8, 1968; by General on March 12, 1968; and by Bell on March 13, 1968. A motion was filed by Bell to strike certain comments of counsel for the CATV Task Force concerning an offer of proof at the hearing by counsel for the City of New York. The motion to strike will be denied since the comments have no decisional significance. The motions to correct the transcript of oral argument will be granted.

acquired under section 221 or 222 of this Act: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

By the arguments advanced on behalf of the several parties to this proceeding pertaining to the designated issues questions have been raised as to : (1) whether the channel service offerings relate to common carrier communications service undertakings; (2) whether the intelligence transmitted or to be transmitted by the telephone companies are interstate communications subject to the Commission's jurisdiction; (3) whether the construction under consideration, which does not cross a state boundary, is purely an intrastate line and therefore exempt under Section 214 (a)(1) from the certificate requirements or is part of an

interstate line; (4) even if a part of an interstate line, whether the construction relates to facilities which are "local, branch, or terminal lines not exceeding ten miles in length" and therefore exempt pursuant to Section 214 (a)(2) of the Act; and (5) whether the service offered in each of the several tariffs is a "telephone exchange service" within the contemplation of Section 221(b) of the Act and therefore not subject to Commission jurisdiction. On behalf of those carriers which heretofore have been classified as "connecting carriers" pursuant to the provisions of Section 2(b)(2) of the Act, the contention is advanced that Section 214(a) is inapplicable to them even if determined to be applicable to the "'fully subject" carriers.[12]

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[12] The ten operating telephone company respondents which claim to be "connecting carriers" are the following: General Telephone Company of Pennsylvania; General Telephone Company of California; United Telephone Company of Pennsylvania; United Telephone Company of Missouri; United Telephone Company of Ohio; United Telephone Company of Kansas, Inc.; Columbia-United Telephone Company; United Telephone Company of Arkansas; United Telephone Company of Iowa; and United Telephone Company of the Carolinas.

The eighteen "fully subject" Bell operating company respondents are as follows: The Chesapeake and Potomac Telephone Company of Virginia; The Chesapeake and Potomac Telephone Company of West Virginia; The Cincinnati and Suburban Bell Telephone Company; The Diamond State Telephone Company; Illinois Bell Telephone Company; Indiana Bell Telephone Company; Michigan Bell Telephone Company; The Mountain States Telephone and Telegraph Company; New England Telephone and Telegraph Company; New York Telephone Company; Northwestern Bell Telephone Company; Ohio Bell Telephone Company; Pacific Northwest Bell Telephone Company; Pacific Telephone and Telegraph Company; Southern Bell Telephone and Telegraph Company; Southern New England Telephone Company; Southwestern Bell Telephone Company; and Wisconsin Telephone Company.

The six non-Bell "fully subject" operating company respondents are: General Telephone Company of Indiana, Inc.; General Telephone Company of Michigan; General Telephone Company of Ohio; General Telephone Company of the Southwest; United Telephone Company of the Northwest; and United Inter-Mountain Telephone Company.

12. In *Common Carrier Tariffs for CATV Systems*, 4 FCC 2d 257, 260 (1966), we held that the furnishing by telephone companies of channels of communications to CATV operators "is clearly a common carrier undertaking." The carriers have not questioned that holding and for the purpose of deciding the applicability of Section 214, we find no reason to depart from that determination.[13] The situation with respect to the CATV operator whom we have held not to be a common carrier is distinguishable. As we pointed out in *Frontier Broadcasting Co.*, 24 FCC 251 (1958), the specific signals received by and distributed on the CATV system are determined by the CATV operator and "No individual subscriber has the option nor may he compel the CATV system to receive and deliver a particular signal at a given time; . . . ." The telephone company, however, makes no determination as to the television stations to be carried on the CATV system, but merely furnishes the channels of communication to the CATV operator who makes the selection as to the signals to be transmitted over the facilities. Since the telephone companies hold out the channel service for hire, invite all existing and prospective CATV operators to use the facilities, and have indicated a willingness and an ability to carry out this hire, the channel service offerings constitute a common carrier service. *United States* v. *California*, 297 US 175, 182 (1936); *United States* v. *Smith*, 215 F 2d 217 (CA6), 1954).

13. CATV channel service offerings of the carriers unquestionably are intended to provide an interstate communications service. The interstate nature of the communication is the basis for our assertion of jurisdiction

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[13] The CATV parties maintain that Section 214 is applicable to the said construction and consequently a contention that the construction does not relate to common carrier offerings would be inconsistent with the position taken in their briefs and at oral argument in this proceeding.

over nonmicrowave CATV systems, and the subject is fully developed in our orders asserting such jurisdiction. See *CATV*, 2 FCC 2d 725, 728-734, 793-797 (1966); *CATV*, 6 FCC 2d 309, 310-312 (1967). Further, our authority to regulate CATV systems has been upheld by the Supreme Court of the United States. *United States et al.* v. *Southwestern Cable Co., et al.*, Case Nos. 363 and 428, October Term, 1967, decided June 10, 1968 (36 US Law Week 4553). Therein, the Court stated: "Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates (footnote omitted)."[14] The carriers contend, however, that the CATV situation is distinguishable since the signals are processed at the CATV headend in preparation for their transmission over the cable, that the television broadcast is terminated and its identity is lost at the headend, that there is thus created a break in the original transmission and, consequently, that there is no through communication from the broadcaster to the cable of the telephone company. Since the input and output points of the telephone company's cable facilities for each CATV system are located within the confines of one state,[15] the carriers assert that the transmission is purely intrastate. The processing is no different from that which takes place in connection with the transmission by microwave and wire of any live coast-to-coast broadcast, and we

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[14] See also, *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, — US App DC —, 387 F 2d 220 (1967), where the Court held that CATV facilities are "a link in the interstate transportation of television signals" and that the system is engaged in interstate commerce.

[15] In only one instance do the cable facilities cross a state boundary. United Telephone Company of the Northwest provides channel distribution services in Hood River, Oregon, and in White Salmon and Bingen, Washington. All three communities are served from one headend.

find the contention to be without merit. The controlling facts here are that the cable facilities furnished by the telephone companies are links in the continuous transmission of the signals from the point of origin to the set of the viewer, and the intelligence received by the viewer is essentially the same as that transmitted by the broadcaster. Irrespective of the location of its physical facilities, the common carrier which thus participates as a link in the relay of television signals is performing an interstate communications service. *Idaho Microwave, Inc.* v. *Federal Communications Commission,* 122 US App. DC 253, 352 F 2d 729 (1965); *Ward* v. *Northern Ohio Telephone Co.,* 300 F 2d 816 (CA 6, 1962); *cert. denied,* 371 US 820; *Pacific Telatronics, Inc.* 37 FCC 1163 (1964).[16]

14. On behalf of the carriers, it is urged that judicial decisions upholding Commission action taken pursuant to Title III of the Act are inapposite since the Commission's common carrier jurisdiction under Title II, which is involved in this proceeding, is not co-extensive with its licensing powers under Title III. The carriers also claim that, assuming the Commission properly asserted jurisdiction over CATV systems and over the services and charges of the carriers to CATV systems, it does not follow that the lines used to provide such services are subject to the

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[16] The principles enunciated in the cited cases also dispose of the carriers' assertion that the cable service provided to CATV systems is not "incidental to radio communication of any kind" within the meaning of Section 202(b) and therefore is not subject to the Commission's common carrier jurisdiction under Title II of the Act. For like reasons we must reject the carriers' argument that by reason of the definition of "radio communication" in Section 3(b) of the Act, Section 202(b) applies only to radio transmission and that the CATV system operates only on a completed transmission. The arguments completely ignore the fact that the common carrier cable facilities are utilized for the purpose of delivering the radio communication and are consequently within the contemplation of Sections 3(b) and 202(b).

certification requirements of Section 214, because the said Section does not apply to "services" but to the "facilities" used to provide such services. It may be, as claimed, that our prior determinations and the authorities relied upon are not dispositive of the issues now before us. Nevertheless, such issues must be resolved on the basis of the statutory scheme of the Act as a whole, and in a manner which will achieve the overall objectives of the Act. See *Carter Mountain Transmission Corporation* v. *Federal Communications Commission*, 116 US App DC 93, 321 F 2d 359 (1963), *cert. denied* 375 US 951; *Conley Electronics Corporation, d/b/a Teleprompter of Liberal, Inc.* v. *Federal Communications Commission, et al.*, 12 RR 2d 2108 (CA 10, decided April 22, 1968).

15. Section 2(a) makes the provisions of the Act applicable "to all interstate and foreign communication by wire or radio . . .," By Section 202(b), in the context of the Act, the Commission has been given regulatory jurisdiction over "services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, . . . incidental to radio communications of any kind." *Ward* v. *Northern Ohio Telephone Co., supra.* Section 301 specifies that the purpose of the Act is "to maintain the control of the United States over all the channels of interstate and foreign radio transmission; . . . ." And the Courts have recognized that the Act confers comprehensive regulatory power on the Commission. *United States et al.* v. *Southwestern Cable Co. et al., supra; National Broadcasting Co.* v. *United States*, 319 US 190, 219 (1943); *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 US 134, 138 (1940).

As for Section 214, "The standard of 'public convenience and necessity' is to be so construed as to secure for the public the broad aims of the Communications Act." *Western Union Division* v. *United States*, 87 F. Supp. 324, 335 (USDC, D of C, 1949), *affirmed* 338 US 864. It is in the light of the foregoing principles that we must con-

sider whether certification is a prerequisite to the construction by a common carrier of facilities to provide CATV channel service.

16. Manifestly, Congress intended by Section 214 to confer upon the Commission broad supervisory control over construction by communications common carriers in order to insure that such construction would not be inconsistent with the public interest; *e.g.*, not wasteful or unnecessary. *Mackay Radio and Telegraph Company*, 6 FCC 562 (1938). As the Supreme Court stated in construing and applying comparable language in the Interstate Commerce Act[17] "... the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public ...." Since Section 214 requires certification as a prerequisite to the construction of "any line" and defines a line as "any channel of communication established by the use of appropriate equipment" with one exception not here pertinent, it would appear under the plain language of the Section that CATV channel service provided by the telephone companies is encompassed within its provisions. The carriers, however, insist that the said channel facilities come within the exemptions specified in Section 214, and that certification is not necessary. In disposing of this contention, we must take into account the remedial nature of the legislation and that exemptions from the sweep thereof should be given a limited or narrow interpretation in order to effect the remedy intended. See *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission, et al.*, 286 US 299, 311-312 (1932); *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Northern Pac. R. Co.*, 120 F Supp 710, 712 (DC Wash.), *affirmed* 225 F 2d 840 (CA 9, 1955).

17. Premising their argument first on the Section 214-(a)(1) exemption concerning a "line within a single State

[17] *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 US 266, 277 (1926).

unless such line constitutes part of an interstate line," the carriers assert that the interstate line contemplated by the Section is an interstate "common carrier" line and that Section 214 is inapplicable unless the facilities of the common carrier cross a state boundary. Pointing out that with the one exception heretofore mentioned, the cable facilities furnished by the carriers to each of the CATV systems are located within the confines of a single state, they contend that only intrastate lines are involved. Further, relying on *Pennsylvania Railroad Co. v. Public Utilities Commission of Ohio,* 298 US 170 (1936), the carriers contend that the non-common carrier facilities of neither the broadcaster nor the CATV operator[18] may be combined with the common carrier facilities of the telephone company to bring a line under certificate requirements as an interstate line. Since no physical facilities of a common carrier cross a state boundary, the carriers state that the CATV channel service is purely an intrastate line and therefore within the contemplation of the Section 214(a)(1) exemption.

18/ The position taken by the carriers is untenable. In the first place, they disregard completely the fact that the term "line" is defined in Section 214 as "*any channel of communication established by the use of appropriate equipment,* other than a channel of communication established by the interconnection or two or more existing channels" (emphasis supplied). Neither the wording of this definition nor anything in the legislative history of Section 214 indicates a Congressional intent to limit the certification requirements thereof to cases where the physical facilities of the common carrier cross a state boundary. On the contrary, we believe that the definition of a line manifests a primary Congressional concern over the channel of communication, rather than merely over the wires and cables, i.e., the equipment, used to establish the

[18] Admittedly, neither is a common carrier. *Frontier Broadcasting Co.,* 24 FCC 251 (1958); Section 3(h) of the Act.

channel.[19] Our view is reinforced by the fact that Section 214 is not confined to the "extension" of a line—which might reasonably be construed as requiring some part of the common carrier facilities to cross a state boundary—but includes the "construction of a new line" even though wholly within a single State so long as it is part of an interstate "channel of communication" or "line." *Southwestern Bell Telephone Company*, 6 FCC 529, 532 (1938). The broadcaster's signal is an interstate channel of communication and the CATV channel distribution system which is a link in the transmission of the signal to the television set of the viewer is a part of that interstate channel. Significantly, the telephone companies have been unable to point to anything in the statutory scheme of the Communications Act which would justify limiting the phrase "channel of communication" to a common carrier channel. Therefore, unless *Pennsylvania Railroad* requires a contrary conclusion, the Section 214(a)(1) exemption has no application here.

19. The case cited above, upon which the carriers rely, is clearly distinguishable. In that case, the transportation across a state boundary was performed by the owner of the product transported who was not subject to the Interstate Commerce Act, and the only movement by a common carrier was purely intrastate. The Court held that the Interstate Commerce Act "is aimed at common car-

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[19] The definition of a line distinguishes *New York Dock Ry.* v. *Pennsylvania R. Co.*, 62 F (2d) 1010 (CA 3, 1933) *cert. denied* 289 US 750, upon which the carriers rely. In that case, the Court held that as used in the Interstate Commerce Act, the word "line" meant the company's "road, yards, tracks" or the "thing itself" (p. 1013). However, the Court expressly held that if the word "transportation" had been used, a different result would have been reached. As used in the Communications Act, however, the word "line" is not confined to the "thing itself" or the "equipment" but extends to that for which the equipment is used and is comparable to the "transportation" to which the Court referred in *New York Dock Ry.*

riers exclusively . . . and not even at all these'' (298 US at 174-175); and that the statute forbids the ''unifying process'' of tacking on to the interstate transportation by the owner of the product, the intrastate transportation of the common carrier in order to make the movement interstate within the contemplation of that Act, and thus subject the whole carriage to the operation of the statute ''when the parts would be exempt'' (298 US at 176). However, the intrastate as well as the interstate transmission of television signals is subject to federal regulation and this is so whether carriage of the signals is performed by a common carrier or a non-common carrier. Consequently, combining the interstate transmission of the broadcaster and the CATV operator with the intrastate carriage by the common carriers does not bring within the contemplation of the Communications Act conduct which would otherwise be exempt; but constitutes an exercise by the Commission of the jurisdiction which has been conferred by the Act over all links in the chain of transmission from the broadcaster to the viewer.[20]

20. In our view, neither the provisions of the Act nor any judicial precedent called to our attention support the carriers' contention that the ''interstate line,'' i.e., the interstate channel of communication, referred to in Section 214, is limited to interstate common carrier lines; and we are persuaded that Congress intended no such limitation. On the contrary, we conclude that cable facilities furnished by a telephone company for the purpose of transmitting television signals from the CATV tower or headend to the premises of the CATV subscribers is part

[20] In this connection, we note that the Court distinguished *United States* v. *Erie Railroad Co.*, 280 US 98 (1928), where the Interstate Commerce Commission was held to have jurisdiction over the rates for a wholly intrastate carriage by a railroad of goods shipped from abroad on the ground that the intrastate transportation was a part of ''foreign commerce,'' and jurisdiction over intrastate transportation under such circumstances had been conferred upon the agency by the statute.

of an interstate channel of communication and consequently is not exempt from the certificate requirements of Section 214 by reason of the provisions of subdivision (a)(1).

21. The carriers further contend that even if not excused from the certification requirements by reason of Section 214(a)(1), the CATV channel service facilities come within the exemption of Section 214(a)(2) as "local, branch, or terminal lines not exceeding ten miles in length, ..." This contention must likewise be rejected. While the legislative history sheds little light on the subject, we believe that the purpose and intent of Section 214 would be defeated by adoption of the interpretation urged upon us by the carriers. Essentially, the exemption is intended to apply to minor additions or improvements to existing facilities or services and the expenditure involved is ordinarily small. Thus, the building of a branch office, or construction to improve the facilities of existing customers or to supply existing services to others who, being within the same territory and similarly situated, are entitled to like service from the carriers, need not be certificated; but such are the types of situations to which the Section 214(a)(2) exemption must be limited. See *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company*, 270 US 266 at 278; Sections 63.01-6303 of the Rules.

22. The construction under consideration in this proceeding, however, involves far more than a minor addition for the improvement or "filling in" of existing services. The channel facilities necessitated a considerable amount of new construction by the telephone companies in order to provide new customers with a type of service significantly different from that theretofore provided in the said communities. Furthermore, substantial outlays of funds were required in order to furnish the CATV channel service. Thus, Indiana Bell expended approximately $900,000 to provide Marion Cable Television, Inc. of Marion, Indiana, with 41.6 miles of feeder and 131.4 miles of distribution cable together with the necessary drops. Southwestern

Bell has furnished See TV Company of Mexico, Missouri, with 15 miles of feeder and 46.4 miles of distribution cable, and the drops at the premises of subscribers, which represented an investment of approximately $300,000. The cable distribution system installed by General Telephone Company of Ohio for Marion CATV, Inc., at Marion, Ohio, consisting of 40.42 miles of feeder and 98.36 miles of distribution cable and the drops cost about $497,000. United Telephone Company of Ohio provided Multi-Channel TV Cable Company of Mansfield, Ohio, with 29.12 miles of feeder cable and 106.27 miles of distribution cable at an approximate cost of $343,220. Other channel distribution systems are smaller and represent less investment by the telephone companies but the fact remains that the total investment by the carriers amounts to millions of dollars. Although each cable distribution system furnishes service only to a local CATV system, such construction does not, in our view, relate to the "local, branch, or terminal lines" contemplated by the Section 214(a)(2) exemption, but relates, instead, to "main" communication lines which should have been certificated.[21]

23. Little discussion is necessary to dispose of the carriers' further contention that channel distribution service for CATV systems must be considered as a telephone exchange service exempt from Commission regulation by Section 221(b) of the Act.[22] By Section 3(r) of the Act,

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[21] In view of our determination, we do not reach, and it is unnecessary to discuss, the question of whether the facilities are more than ten miles in length.

[22] Section 221(b) provides as follows: "Sec. 221. (a) . . . (b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority."

a "telephone exchange service" is defined as: ". . . service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange and which is covered by the exchange service charge."

24. The construction attributed by the carriers to the phrase "telephone exchange service" must be rejected as inconsistent with the plain meaning of the words used. Manifestly, the phrase is intended primarily to apply to a telephone or comparable service involving "intercommunication," i.e., a two-way communication, not the one-way transmission of signals which takes place with respect to CATV channel service. Furthermore such channel service does not require an exchange,[23] does not go through an exchange, and is totally unrelated to the "exchange service charge." For like reasons, the carriers' assertion that "intercommunicating service" defines the area within which a service may be regarded as telephone service must also be rejected. The words are not used in connection with area but with reference to the "character" of the service "ordinarily furnished by a single exchange . . ." Since Section 221(b) is not even remotely applicable to the construction of lines for CATV channel distribution service, we need not concern ourselves with the extent of any local government regulation of telephone exchange services.

25. We conclude on the basis of the foregoing that Section 214 of the Act is applicable to the construction of channel distribution systems for CATV operations, and compliance with the certification provisions thereof is required at least by the "fully subject" carriers. The next

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[23] According to Webster's New World Dictionary, one of the definitions of an "exchange" is "a central office, or a system operated by it, providing telephone communication in a community or in part of a city." CATV service is not operated by or through a central office.

question to be resolved is whether Section 214 is applicable to those carriers which heretofore have been classified as "connecting carriers" pursuant to Section 2(b)(2) of the Act which provides in pertinent part as follows:

> (b) Subject to the provisions of Section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . . (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, ..."

26. We find no basis in the Act for any exemption from the certificate requirements of Section 214 on behalf of connecting carriers. The connecting carrier which furnishes channel service to a CATV system is engaged in interstate communication because, just as in the case of the fully subject carrier, it acts as a link in the interstate transmission of television signals from the broadcaster to the viewer (*supra*, par. 18), and not "solely" by reason of any interconnection with another common carrier. To hold otherwise would accord the connecting carrier a preferred status merely because, with respect to other unrelated common carrier activities, the provisions of Section 214 are not applicable.

27. The decisive factor in determining the applicability of Section 214 is the character of the communication for which the construction is undertaken, rather than the classification of the carrier as a connecting carrier. Thus, in *Ward* v. *Northern Ohio Telephone Co.*, 300 F 2d 816 (CA 6, 1962), *cert. denied*, 371 US 820, the Court held that a telephone company which had been classified as a connecting carrier is engaged in interstate communication, and is in interstate commerce, "in so far as the furnishing, or the obligation to furnish wires for broadcast purposes" is

concerned. No significant distinction exists between wire service to a broadcast station and wire service to a CATV since both are, as heretofore stated, links in the interstate transmission of television signals and are "incidental to radio communication." We therefore hold that the construction of lines for the purpose of providing channel service either to a broadcast station or to a CATV system must be certificated pursuant to the provisions of Section 214. To the extent that *Capital City Telephone Co.*, 3 FCC 189 (1936), upon which the connecting carriers rely, is inconsistent with our present holding, it is overruled.

28. In addition to making application for certificates of public convenience and necessity under Section 214, the connecting carriers must also comply with the tariff and other provisions of the Act to the same extent as the fully subject carriers with respect to channel services provided to broadcasting stations and to CATV systems. We wish to make clear, however, that the carriers' status as connecting carriers with respect to those interstate activities resulting "solely through physical connection with the facilities of another carrier," are not intended to be affected, and are not affected, by our determination here.

29. None of the respondent carriers has filed applications pursuant to Section 214 of the Act and Part 63 of the Rules for authority to construct or operate facilities used to provide CATV channel service. We shall direct, therefore, that each of the respondent carriers in this proceeding file within twenty days after the release of this decision applications for certification of any and all such facilities which heretofore have been constructed; that work on any construction in process be discontinued; and that no further construction of CATV channel distribution facilities be undertaken until application for Section 214 certification has been filed and Commission authorization for such construction has issued. In addition, we deem it essential to take remedial action herein which will dissipate, to the extent possible, the adverse effects upon the public of the unlawful conduct of the carriers.

30. Under Section 214(c) of the Act, the Commission is authorized to institute judicial proceedings for an injunction against the unlawful construction of common carrier facilities and against the operation by the carriers of facilities constructed without the required certification.[24] Despite the contention of the telephone companies that an injunction is the only remedy available for a violation of Section 214 we do not believe that we are so limited. Section 312(b) of the Act expressly provides that the Commission may order any person who "has violated or failed to observe any of the provisions of this Act," or "any rule or regulation of the Commission" to cease and desist from such action. The evidence of record establishes that Bell, General, and United have constructed facilities for the purpose of providing channel service to CATV systems in numerous communities throughout the United States without applying for or receiving Section 214 certification; that they are operating such facilities in violation of the Rules; and that the construction of additional facilities in violation of the Act and the rules is continuing at a rapid rate. From the record it also appears that in some communities CATV channel service is being provided from more than one source. Whether there is involved wasteful duplication of facilities by a common carrier we need not now determine since that is a matter for consideration in connection with the Section 214 certification. However, in these circumstances we not only have the authority, but we have the obligation in the public interest to bring to an end as expeditiously as possible the widespread violations of the Act and the rules by the telephone company respondents.

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[24] In pertinent part, Section 214(c) provides: "Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State Commission, any State affected, or any party in interest."

31. Cease and desist orders are called for in this proceeding and we shall issue such orders which, as we indicated when we designated this adjudicatory proceeding for hearing, will be "tailored to the particular factual situation" (7 FCC 2d at 576). There are a number of pertinent factors to be taken into account in fashioning the cease and desist orders in each case. Thus, the considerations which govern the disposition to be made of proceedings involving the connecting carriers differ from those which apply to the fully subject carriers (see par. 41, *infra*). The date when the carrier first was placed on notice that a question existed as to the applicability of Section 214 to construction for CATV channel service is particularly significant. In our order released October 21, 1966 (5 FCC 2d 357), we included a Section 214 issue. At least insofar as the fully subject carriers are concerned, we find that any construction to provide channel service to CATV systems after that date was undertaken with knowledge of its possible unlawfulness. Consequently, the carriers assumed the risk that such construction might be the subject of remedial action by the Commission. Other circumstances, such as the filing of a formal complaint by a CATV operator or prospective operator challenging the lawfulness of such construction in a specific community, may make advisable the use of an earlier date. However, whether October 21, 1966, or some other date is used as the base date, continued operation of common carrier distribution facilities which thereafter first became operational may be permitted in situations where the facilities were substantially completed on or before the base date.[25]

32. A factor militating against relief of a common carrier from the cease and desist order to be entered herein

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[25] By substantially completed, we mean those facilities where the cost of equipment actually installed, together with the cost of installation, constitutes 50 percent or more of the total expended for equipment and labor initially to put the CATV channel distribution system into operation.

is the existence of an affiliation between the CATV operator and the telephone company serving the particular community, such as a parent-subsidiary relationship or where both are under common control. By reason of its control over utility poles, or other local advantages resulting from its status as an existing common carrier in the community, the telephone company is in a position to preclude or to substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition. Furthermore, construction by a telephone company for an affiliated CATV operator calls for careful scrutiny on the part of the Commission in order to insure against wasteful duplication or unnecessary construction. Where such an affiliation exists, therefore, it is doubtful that any sufficient equitable basis exists for according permanent relief to the carrier, and we would be inclined to deny such relief absent a showing of specially meritorious circumstances requiring a contrary conclusion in the public interest. Other factors to be weighed in these cases and other considerations relating to the connecting carriers will be discussed in greater detail below in fashioning the particular orders to be entered in individual cases.

33. As of October 21, 1966, Bell companies had completed construction of channel distribution facilities which were in operation and providing service to 34 CATV operators whose systems furnish CATV service to subscribers in approximately 40 communities. In no case is the CATV operator a subsidiary or affiliate of Bell. Attached hereto as an Appendix is a list of the common carrier CATV distribution facilities which were in operation on or before October 21, 1966. With respect to these facilities we shall require that applications for certification pursuant to Section 214 of the Act and Part 63 of the Rules be filed within 20 days after the release of this decision. If an application is timely filed, the carrier serving each of the CATV systems enumerated in the Appendix is authorized to continue operation of its channel facilities pending Commission ac-

tion on the application, and is exempt from the cease and desist order issued herein.

34. With respect to each of the remaining facilities where a Bell operating company commenced furnishing service after October 21, 1966, and on or before the release of this decision, the carrier must cease and desist from the operation thereof, with the exceptions hereafter to be discussed, within 30 days after the release of this decision, and to desist from further operation until Section 214 certification applications are filed and approval for the said construction is received from the Commission. The exceptions to be permitted relate to those systems where 50 percent or more of the total cost of equipment installed and the cost of installation was expended by October 21, 1966, or prior to the time that the lawfulness of the carrier's construction of CATV channel facilities in a particular community was challenged. On October 11, 1966, International Cable T.V. Corporation filed a complaint against the furnishing of CATV channel service pursuant to the proposed tariff of The Pacific Telephone and Telegraph Company insofar as service was contemplated to a CATV system at Altadena, California. The record in this proceeding discloses that CATV channel service to All-Metal Fabricators, Inc. at Altadena commenced on February 20, 1967. In this instance, we shall use October 11, 1966, as the date on which the 50 percent completion test heretofore described must be met. Therefore, Pacific Telephone must cease and desist from further operation of the Altadena CATV channel service within 30 days after the release of this decision unless within 20 days after the said release date, the carrier files a Section 214 certification application and in addition shows by an appropriate pleading supported by affidavits and other factual information that as of October 11, 1966, it had expended for equipment actually installed and for the installation thereof at least 50 percent of the total amount expended by February 20, 1967. With respect to all other Bell operating companies which commenced op-

eration of CATV channel distribution systems after October 21, 1966, and on or before the release date of this decision, the controlling date for the application of the 50 percent test is October 21, 1966.[26] In each instance, upon the filing within 20 days after the release date of this decision of required certification applications and an appropriate showing that 50 percent or more of the total cost had been expended by that date, the carrier will be authorized to continue the operation of its CATV channel service pending further order of the Commission. Further, where service commenced between the base date and the release date of this decision, and the 50 percent exception is inapplicable, the carrier may continue furnishing channel service to the CATV system pending further order of the Commission provided that within 20 days after the release date of this decision a certification application is submitted and there is filed a pleading, substantiated by affidavits and other supporting factual data, showing that the existing CATV operator is the only one holding a franchise authorizing such operation, that at the time service was commenced no other application for channel service or for a pole line attachment or other like application was pending before the carrier, and that the cease and desist order will result in the complete deprivation of CATV service to the subscribers in the community; or any other public interest factors which warrant relief from the cease and desist order. Responsive pleadings in each case may be filed within ten days, but no replies to such responses will be entertained.

35. As for any channel service facilities of a Bell operating company which had not commenced operation on or before this decision's release date, the carrier shall cease and desist from any further construction immediately. Within 20 days after the said release date, certification applications shall be filed for all CATV channel service facili-

[26] We consider the complaint filed on October 13, 1966, by NCTA against several Bell operating companies as being too general in nature to warrant use of the earlier date against such companies.

ties heretofore completed. No further construction on uncompleted facilities and no construction of new facilities to furnish channel service to CATV systems shall be undertaken until requests for certification have been filed and approved by the Commission.

36. In determining the nature of the cease and desist orders to be issued against the General and United operating companies, we shall treat first the fully subject carriers of each and thereafter the operating companies which claim exemption from the provisions of Section 214 as connecting carriers. The facilities of General for the furnishing of CATV channel service to which we shall now direct our attention are as follows:

Telephone Operating Co.	*CATV Systems*	*Communities Served*
General Telephone Co. of Ind.	GT&E Communications	Angola, Ind.
	Indiana Cable TV, Inc.	Terre Haute, Ind.
	GT&E Communications	Winchester, Ind.
General Telephone Co. of Mich.	Booth American Co.	Muskegon, Mich.
	GT&E Communications	South Haven, Mich.
General Telephone Co. of Ohio	Marion CATV, Inc.	Marion, Ohio
General Telephone Co. of the Southwest	GT&E Communications	Brownfield, Texas
	GT&E Communications	Levelland, Texas

37. Distribution service by General Telephone of Michigan, to Booth American Company at Muskegon, Michigan, commenced during March, 1966, and upon the filing of a Section 214 application within 20 days after the release of this decision, such service may be continued pending a determination by the Commission on the said application. Like action will be taken with respect to the channel service furnished by General Telephone of Ohio to Marion CATV, Inc. at Marion, Ohio, which commenced during October, 1966. Upon the timely filing of an application for certification, such service may be continued during the penedency of the matter before the Commission. During November, 1966, General Telephone of Indiana commenced furnishing channel service to Indiana Cable TV, Inc., at Terre Haute, Indiana, but a substantial amount of con-

struction may have been completed by October 21, 1966. In accordance with the procedure outlined in paragraph 34 above, service to Indiana Cable may be continued pending further order of the Commission upon the filing within the specified 20-day period of a Section 214 certification application and a properly supported pleading which indicates that the 50 percent test as of October 21, 1966, applies,[27] or that other public interest factors exist which justify exempting the carrier from the operation of the cease and desist order.

38. In Angola and Winchester, Indiana, South Haven, Michigan, and Brownfield and Levelland, Texas, operating companies of General are furnishing channel service to GT&E Communications, Inc. (GT&E), which is a wholly owned subsidiary of General. While some of the channel facilities were completed or substantially completed on or before October 21, 1966, a cease and desist order appears to be appropriate because of the relationship between the carrier and the CATV operator. As we have previously indicated, the operation of facilities in these circumstances will be authorized only where particularly meritorious circumstances are established where require such action in the public interest. Nevertheless, we shall permit the continued operation of these facilities pending further order of the Commission provided that within 20 days after the release of this decision application for certificates of public convenience and necessity are filed and a pleading substantiated by affidavits and other supporting factual data is submitted to show: (a) that no operator other than GT&E holds a franchise or is otherwise authorized to operate a CATV system in the community; (b) that at the time the distribution facilities were constructed and put into operation no application by a competing operator or prospective

[27] In view of the general nature of the complaint filed on October 14, 1966, by NCTA against the operating companies of General (Docket No. 16934), we do not believe that use of the earlier date is warranted.

operator either for channel service or for a pole line attachment arrangement or other like application was pending before the carrier; (c) that the enforcement of a cease and desist order would result in the complete deprivation of CATV service to the subscribers in the community; and (d) any other factors which warrant relief from the cease and desist order in the public interest. However, the operating telephone companies of General named in paragraph 36 will be required to cease and desist from the further construction of CATV channel distribution facilities and, except as specifically herein provided, to cease and desist from the operation of facilities heretofore constructed until a certificate pursuant to Section 214 of the Act and Part 63 of the Rules is applied for and approval is obtained. As to any construction heretofore undertaken, the application for certification must be filed within 20 days after the release of this decision. Responsive pleadings to those herein authorized may be filed within 10 days but no reply pleadings will be entertained.

39. Two fully subject operating companies of United provide channel distribution facilities to CATV systems. United Telephone Company of the Northwest commenced construction of such facilities for the CATV system serving Hood River, Oregon, and White Salmon and Bingen, Washington, on September 2, 1966, and they were completed on April 14, 1967. United Inter-Mountain Telephone Company provides CATV channel service in Abingdon and Gate City, Virginia, and in Greeneville, Kingsport, Sullivan Gardens, Church Hill, and Mount Carmel, Tennessee; at the time of the hearing it had definitive plans to furnish like service for CATV operations at Galax and Saltville, Virginia, and consideration was being given to providing service to CATV operations in other communities. The record contains no information concerning the date the distribution facilities constructed by Inter-Mountain first became operative. The record does establish, however, that the CATV operator in each community to which United of the North-

west and United Inter-Mountain provides channel service is United Transmission, Inc., a wholly owned subsidiary of United Utilties, Inc., the parent corporation of the operating telephone companies.

40. In view of the affiliation between the telephone company furnishing the channel service and the CATV operator, we are persuaded that a cease and desist order is necessary in the public interest and that relief from the operation thereof should be granted only upon a showing that countervailing public interest considerations justify such action. Therefore, except as hereafter provided, we shall direct that within 30 days after the release of this decision United Telephone Company of the Northwest and United Inter-Mountain Telephone Company cease and desist from further operation of each and every channel distribution system furnishing service to United Transmission which became operational on or before the release of this decision; and that the said telephone companies cease and desist from further construction of such facility until application is made for a certificate of public convenience and necessity and the certificate for that particular facility is issued. With respect to any construction heretofore undertaken, the certification application shall be filed within 20 days. However, we shall permit each of the channel distribution facilities completed and in operation on or before the release of this decision to continue in operation pending further order of the Commission provided a Section 214 application is filed within 20 days and a pleading substantiated by affidavits and other supporting factual data is filed within the said 20-day period containing the following showing:

(a) The date the distribution facilities for each CATV system in each community first became operational.

(b) The total cost of equipment and labor for each of the distribution facilities constructed.

(c) That no operator other than United Transmission holds a franchise or is otherwise authorized to operate a CATV system in the community.

(d) That prior to or at the time the distribution facilities were constructed, no application by a competing operator or prospective operator either for channel service or for a pole line attachment arrangement or other like application was pending before the carrier.

(e) That the enforcement of a cease and desist order would result in the complete deprivation of CATV service to the subscribers in the community.

(f) Any other public interest factors which are relevant and material to a determination as to whether relief from the cease and desist order is warranted.

Responsive pleadings may be filed within 10 days but no replies will be entertained.

41. Next we come to a consideration of the action to be taken in the situation where the distribution facilities were constructed by telephone companies which have been classified as connecting carriers pursuant to Section 2(b)(2) of the Act. In balancing the equities in favor of the carriers against the advisability of a cease and desist order in the public interest, we must give weight to the fact that connecting carriers, relying on our decision in *Capital City, supra*, had reason to believe that Section 214 was not applicable to their construction of lines for the purpose of furnishing channel service to CATV systems. Thus, there does not appear to be the flagrant violation of the Act and the rules committed by the fully subject carriers, and a "grandfathering" as of the date of release of this decision may be warranted. Nevertheless, any equities in favor of the connecting carriers may be counterbalanced by notice that a question existed as to the lawfulness of con-

struction in a specific community through the filing of a complaint directed at the particular construction or by other public interest considerations such as the existence of an affiliation between the carrier and the CATV operator.

42. Two operating companies of General with connecting carrier status provide CATV channel service, and they are respondents herein, namely: General Telephone Company of California (formerly California Water and Telephone Company) and General Telephone Company of Pennsylvania. General of California has furnished channel service to International Cable, an unaffiliated owner, for a CATV system at Hastings Ranch, California, since November, 1966, and at the time of the hearing in this proceeding it was in receipt of a firm order for channel service from the same operator for a system at Duarte, California. We do not believe that the general allegations contained in complaints filed during October, 1966, are sufficient to justify the denial of equitable relief to General of California with respect to facilities for an unaffiliated owner which were constructed and in operation on or before the release date of this decision. Provided applications for certification for such completed facilities are filed within 20 days, the continued operation thereof is authorized pending disposition of the applications. However, except as herein authorized, General of California will be required to cease and desist from further construction of distribution facilities, to submit within 20 days certification applications for construction previously undertaken, and to undertake no new construction until authorized by the Commission. Further, if channel service is being furnished to a CATV system by a subsidiary or affiliate of General or by the telephone company itself,[28] the carrier must cease and desist from the operation thereof within 30 days unless within 20 days an application pursuant to Section 214 is submitted and a

[28] From the record it appears that General of California provides CATV service directly to viewers in some areas.

pleading is filed specifying the operator of each CATV system, the community involved, and containing the other information outlined in paragraph 40(a) through (f). Responsive pleadings as therein authorized may be filed.

43. General of Pennsylvania has provided channel service to an unaffiliated CATV system, Laurel Cablevision, at Somerset, Pennsylvania, since December, 1966. As with the Hastings Ranch CATV system, the carrier will be required to file a certification application for the facilities within 20 days, and if filed, operation thereof may be continued pending disposition of the application. Channel service to a CATV system at Vandergrift, Pennsylvania, has been provided by General of Pennsylvania since April, 1966. In this case, however, the CATV operator is the affiliated company, GT&E Communications. With respect to the operation of the distribution facilities for this system, and for any other distribution service to an affiliated CATV operator, a cease and desist order will be issued subject to the conditions and the submission of the applications, pleadings and information outlined in paragraph 40. Under no circumstances shall new construction to provide channel service to a CATV system be commenced until a certificate of public convenience and necessity is issued by the Commission.

44. Of the eight respondent operating telephone companies of United which have been classified as connecting carriers,[29] no distribution facilities for CATV systems have been constructed by United of Arkansas, of Iowa, or of the Carolinas and consequently no consideration need be given to the issuance of cease and desist orders against those companies. United of Ohio has provided channel service for an undisclosed period of time to Sidney Cable TV Co., which is unaffiliated with United, for CATV operations at Sidney, Ohio. Consistent with the position taken in con-

[29] See footnote 12.

nection with other like operations, continued channel service to Sidney Cable will be authorized provided certification applications are filed within 20 days. Channel service for a CATV system in Mansfield, Ohio, was commenced by United of Ohio on June 28, 1965. However, the Mansfield system is presently operated by Multi-Channel TV Cable Company which is affiliated with United and with respect to this system a cease and desist order will be issued in accordance with the procedure and pursuant to the conditions outlined in paragraph 40; except that information concerning the time when service was commenced and the cost of equipment and labor, which was supplied at the hearing, need not be repeated.

45. All of the CATV distribution facilities constructed or proposed to be constructed by United of Pennsylvania,[30] Columbia-United, and United of Kansas are for the purpose of providing channel service to CATV systems owned by an affiliated company.[31] We shall therefore direct that each of the said carriers cease and desist from further construction of such facilities until Commission authorization is received, and that it cease and desist from the operation of any channel facilities heretofore constructed except to the extent authorized and subject to the procedure outlined in paragraph 40; and upon compliance with the prequisites therein specified, operation is authorized pending further order of the Commission.

46. United Telephone Company of Missouri has constructed lines to provide channel service to CATV systems located in a number of communities in the State of Mis-

[30] United Transmission is the operator of CATV systems serving Chambersburg, Fayetteville, Claysburg, Martinsburg, and Roaring Spring. At the time of the hearing, construction of channel facilities was planned to serve Hanover for Penn-Mar CATV, Inc., of which United Transmission owns 33⅓ percent of the capital stock.

[31] United Transmission is the only customer for CATV channel service for Columbia-United and United of Kansas.

souri;[32] and at the time of the hearing construction was contemplated to provide service to CATV systems in at least two additional communities.[33] In each case, the CATV operator or prospective operator is an affiliate of United.[34] Because of the special circumstances relating to Warrensburg, we shall discuss the CATV operations in that community first.

47. In Warrensburg, Missouri, CATV service is being provided by two CATV systems, each of which holds a nonexclusive franchise for its operation. One of the CATV operators is Warrensburg Cable, Inc. and the other is United Transmission, Inc., the wholly owned subsidiary of United. On October 12, 1966, Warrensburg Cable filed a formal complaint[35] charging that lines were being constructed by United of Missouri to provide CATV distribution service to United Transmission, that no certificate of public convenience and necessity pursuant to Section 214 of the Act had been obtained, that certification was required, and that therefore such construction was unlawful. At the time the complaint was filed, service to United Transmission had not been instituted but on November 7, 1966, the carrier commenced providing CATV service to United Transmission. In its complaint, Warrensburg Cable requested that the Commission direct the carrier to cease the construction of additional facilities or to use the facilities previously constructed. In this case, United of Missouri had clear and definite notice at least as of the date the formal complaint was filed, that a question existed as

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[32] The communities where service had commenced are Lebanon, Warrensburg, Warsaw, Fairfax, and Tarkio.

[33] Windsor and Butler.

[34] The CATV operator at Lebanon is Le-Mo Cable Co., of which only 10 percent of the stock is not under United control. United Transmission is the operator of the remaining CATV systems.

[35] An informal complaint had been filed on August 15, 1966.

to the lawfulness of its construction to provide channel service in Warrensburg. Nevertheless, United persisted in the construction of such facilities without awaiting a determination of that question by the Commission and without submitting applications for certification. In these circumstances, United's conduct appears to be inexcusable, and a cease and desist order will issue. No further construction of CATV facilities should be commenced without prior certification, and applications for Section 214 certification for construction heretofore undertaken shall be filed within 20 days. Nevertheless, we shall permit United of Missouri to continue operation of its existing facilities pending further order of the Commission provided the certification applications are timely filed and within 20 days a pleading substantiated by affidavits and other supporting factual data is submitted containing the following information concerning the channel service being provided at Warrensburg to United Transmission:

(a) The amount actually expended by August 15, 1966, for equipment actually installed and for the cost of installation thereof.

(b) The amount actually expended by October 12, 1966, for equipment actually installed and for the cost of installation thereof.

(c) The amount expended between May 1, 1967, and the date of release of this decision for equipment and for the installation thereof.[36]

(d) The number of CATV subscribers of United Transmission's system as of the date of release of this decision.[37]

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[36] From United's Exhibit No. 3 (page 3) it appears that the total investment as of May 1, 1967, was $72,717.00.

[37] As of May 1, 1967, the Warrensburg CATV system of United Transmission had 170 subscribers.

(e) Whether there are any areas within Warrensburg which are served by the CATV systems of both United Transmission and Warrensburg Cable, and if there are, a description of such areas.

(f) Any public interest factors which are relevant and material to a determination of the extent to which permanent relief from the cease and desist order is warranted.

Upon receipt of this information we shall be in a better position to determine precisely what remedial action should be taken. Responsive pleadings, as heretofore authorized in like situations, may be filed within 10 days.

48. In each of the remaining communities where United of Missouri provides or proposes to provide channel service to CATV systems operated by affiliated companies, we shall, consistent with the action we are taking in other like situations, direct the telephone company to cease and desist from any further construction of CATV distribution facilities until authorization therefore is obtained, and to submit within 20 days certification applications for any construction undertaken prior to the release of this decision. With respect to any channel facilities completed and in operation on or before the release of this decision, continued operation pending further order of the Commission is authorized provided the carrier complies with the prerequisite set forth in paragraph 40, except that information supplied at the hearing need not be repeated.

49. Accordingly, It Is Ordered, That each of the respondent operating telephone companies of Bell, General, and United file within 20 days after the release of this decision applications for certificates of public convenience and necessity pursuant to Section 214 of the Act and Part 63 of the Rules for any and all construction heretofore undertaken for the purpose of providing channel service to community antenna television (CATV) systems.

50. It Is Further Ordered, That each of the respondent telephone companies of Bell, General, and United Cease and Desist from the further construction of any facilities for the purpose of providing channel service to CATV systems until applications for certificates of public convenience and necessity have been filed as required by Section 214 of the Act and Part 63 of the Rules for such construction and approval therefor is obtained from the Commission.

51. It Is Further Ordered, That within 30 days after the release of this decision the respondent Bell System telephone companies and each of them Cease and Desist from the operation of any CATV channel distribution facilities which were completed and in operation on and before the release of this decision except that upon the filing of the Section 214 certification applications required herein, the operation of such facilities may be continued in the circumstances hereinafter specified and subject to the following conditions, provisions and prerequisites:

a. The telephone companies named in the Appendix hereto are authorized to continue to provide channel service to the CATV systems specified therein pending disposition by the Commission of timely filed applications for Section 214 certification.

b. Upon the filing within 20 days after the release of this decision of a pleading by The Pacific Telephone and Telegraph Company supported by affidavits and other factual information showing that by October 11, 1966, it had expended for equipment actually installed and for the cost of installation thereof at least 50 percent of the total amount expended by February 20, 1967, for facilities to provide channel service to All-Metal Fabricators, Inc. at Altadena, California, the operation of such facilities pending further order of the Commission is authorized; and upon the timely filing of a pleading by any other Bell operating company concerning channel service

in operation on or before the release of this decision, that 50 percent or more of the total cost of facilities to provide such channel service was expended by October 21, 1966, as is more fully set forth in paragraph 34 of this decision, the operation of such facilities pending further order of the Commission is likewise authorized.

c. With respect to each community where service commenced on or before the release of this decision and the 50 percent completion test is inapplicable, the Bell operating telephone company is authorized to continue to provide channel service to the CATV system pending further order of the Commission provided a pleading is filed within twenty days containing the information outlined in paragraph 34 of this decision.

52. It Is Further Ordered, That within 30 days after the release of this decision the fully subject respondent General System telephone companies and each of them Cease and Desist from the operation of any CATV channel distribution facilities which were completed and in operation on and before the release of this decision except that upon the filing of the Section 214 certification applications required herein, the operation of such facilities may be continued in the circumstances hereinafter specified and subject to the following conditions, provisions, and prerequisites:

a. Pending action by the Commission on timely filed Section 214 certification applications, the General Telephone Company of Michigan is authorized to continue to provide channel service to Booth American Company at Muskegon, Michigan; and General Telephone Company of Ohio is authorized to continue to provide channel service to Marion CATV, Inc. at Marion, Ohio.

b. Upon the filing within 20 days after the release of this decision by General Telephone Company of Indiana of a pleading containing the information, and in accordance with the procedure, outlined in paragraph 37 of this decision, the carrier is authorized to continue to furnish channel service to Indiana Cable TV, Inc. at Terre Haute, Indiana, pending further order of the Commission.

c. Upon the filing within 20 days after the release of this decision of pleadings containing the information outlined in paragraph 38 of this decision, continued operation of CATV channel facilities pending further order of the Commission is authorized in order to provide channel services to GT&E Communications, Inc. by General Telephone Company of Indiana at Angola and Winchester, Indiana; by General Telephone Company of Michigan at South Haven, Michigan; and by General Telephone Company of the Southwest at Brownfield and Levelland, Texas.

d. With respect to any channel distribution facilities completed and in operation on and before the release of this decision, and not specifically mentioned herein, continued operation pending further order of the Commission is authorized upon the filing within 20 days of a pleading containing the date the facilities first became operative, the total cost of equipment and labor for each of the facilities constructed, and the additional information outlined in paragraph 38 of this decision.

53. It Is Further Ordered, That within 30 days after the release of this decision the fully subject respondent United operating telephone companies and each of them Cease and Desist from the operation of any CATV channel distribution facilities which were completed and in opera-

tion on and before the release of this decision except that upon the filing of the Section 214 certification applications required herein, the operation of such facilities may be continued in the circumstances hereinafter specified and subject to the following conditions, provisions, and prerequisites:

a. Upon the filing within 20 days after the release of this decision of pleadings containing the information outlined in paragraph 40 of this decision, continued operation of any such completed and operational CATV channel facilities pending further order of the Commission is authorized in order to provide channel service by United Telephone Company of the Northwest and by United Inter-Mountain Telephone Company to United Transmission, Inc., a wholly owned subsidiary of the parent corporation of the operating telephone companies.

b. With respect to any CATV channel distribution facilities completed and in operation on and before the release of this decision, and not specifically mentioned herein, continued operation pending further order of the Commission is authorized upon the filing within 20 days of a pleading containing the information outlined in paragraph 40 of this decision.

54. It Is Further Ordered, That within 30 days after the release of this decision, General Telephone Company of California and General Telephone Company of Pennsylvania, heretofore classified as connecting carriers pursuant to Section 2(b)(2) of the Act, Cease and Desist from the operation of any CATV channel distribution facilities which were completed and in operation on and before the release of this decision except that upon the filing of the Section 214 certification applications required herein, the operation of such facilities may be continued

in the circumstances hereinafter specified and subject to the following conditions, provisions, and prerequisites:

a. Pending action by the Commission on timely filed applications for certificates of public convenience and necessity, General Telephone Company of California is authorized to continue the provision of channel service to International Cable for its CATV operations at Hastings Ranch, California, and, if the channel distribution facilities were completed and in operation on and before the release of this decision, for International Cable's CATV operations at Duarte, California; and General Telephone Company of Pennsylvania is authorized to continue to furnish channel service to Laurel Cablevision for its CATV operations at Somerset, Pennsylvania.

b. Upon the timely filing of a pleading in accordance with the procedure and containing the information outlined in paragraph 42 of this decision, General Telephone Company of California is authorized to continue pending further order of the Commission, operation of channel distribution facilities completed and in operation on and before the release of this decision for the purpose of providing channel service to CATV systems owned or operated by General Telephone Company of California or by a subsidiary or affiliate of the parent General System.

c. Upon the timely filing of a pleading in accordance with the procedure and containing the information outlined in paragraph 43 of this decision, General Telephone Company of Pennsylvania is authorized pending further order of the Commission to continue operation of existing channel distribution facilities to provide channel service to a CATV system owned or operated by a subsidiary or affiliate of General.

55. It Is Further Ordered, That United Telephone Company of Ohio, United Telephone Company of Pennsylvania, Columbia-United Telephone Company, United Telephone Company of Kansas, and United Telephone Company of Missouri, heretofore classified as connecting carriers pursuant to Section 2(b)(2) of the Act, and each of them Cease and Desist from the operation of any CATV channel distribution facilities which were completed and in operation on and before the release of this decision except that upon the filing of the Section 214 certification applications required herein, the operation of such facilities may be continued in the circumstances hereinafter specified and subject to the following conditions, provisions, and prerequisites:

a. Pending action by the Commission on timely filed applications for certificates of public convenience and necessity, United Telephone Company of Ohio is authorized to continue to furnish channel service to Sidney Cable TV Co. for its CATV operations at Sidney, Ohio.

b. Upon the timely filing of a pleading in accordance with the procedure and containing the information outlined in paragraphs 44 and 45 of this decision, each of the above-mentioned telephone companies, except United Telephone Company of Missouri, is authorized pending further order of the Commission to continue operation of channel distribution facilities completed and in operation on and before the release of this decision for the purpose of providing channel service to CATV systems owned or operated by a subsidiary or affiliate of United.

c. Upon the timely filing of a pleading in accordance with the procedure and containing the information outlined in paragraph 47 of this decision, United Telephone Company of Missouri is authorized pending further order of the Commission to continue operation of the channel distribution facilities for the purpose of furnishing channel service at Warrens-

burg, Missouri, to United Transmission, Inc., a wholly owned subsidiary of United.

d. Upon the timely filing of a pleading in accordance with the procedure and containing the information outlined in paragraph 48 of this decision, United Telephone Company of Missouri is authorized pending further order of the Commission to continue operation of channel distribution facilities in each of the remaining communities, other than Warrensburg, Missouri, where it operates such facilities for the purpose of providing channel service to CATV systems owned or operated by a subsidiary or affiliate of United.

56. It Is Further Ordered, That in each of the situations where a pleading is authorized to be filed within 20 days after the release of this decision, responsive pleadings ARE AUTHORIZED within 10 days after the expiration of such 20-day period, but no reply pleading will be entertained.

57. It Is Further Ordered, That the unopposed motion to correct the transcript of hearing filed by NCTA on September 5, 1967, IS GRANTED.

58. It Is Further Ordered, That the motion to strike filed by Bell on March 12, 1968, IS DENIED since the comments to which reference is made have no decisional significance.

59. It Is Further Ordered, That motions to correct the transcript of oral argument filed on March 4, 1968, by the CATV Task Force; on March 5, 1968, by the Common Carrier Bureau; on March 8, 1968, by United; on March 12, 1968, by General; and on March 13, 1968, by Bell, ARE GRANTED.

Federal Communications Commission
Ben F. Waple
Ben F. Waple
Secretary

(Seal)

Bell Operating Co.	*CATV Operator*	*Communities Served*
C&P of Virginia	Pulaski Television System	Pulaski, Virginia
C&P of W. Virginia	C&S TV Company	Chester, W. Va.
Illinois Bell	Dwight Perfect Picture Cable TV, Inc.	Dwight, Ill.
	Iroquois Cable Company	Watseka, Ill.
	Morris CATV, Inc.	Morris, Ill.
Indiana Bell	Marion Cable Television, Inc.	Marion (Grant County) Indiana
Michigan Bell	Consolidated Land Co.	Lakeshire Village, Michigan
	Lakeside Mobile Court	Lakeside Mobile Ct. in Flint, Mich.
	Port Huron TV Cable Co.	Port Huron, Mich.
	Twin Valley CATV, Inc.	Hillsdale and Jonesville, Mich.
	Wonderland Ventures, Inc.	Flint, Mich.
Mountain State Telephone & Telegraph Co.	Westerly Cable Television Corp.	Manitou Springs, Colorado
New England Telephone & Tele-Graph Co.	Cape Cod Cablevision Corp.	Hyannis, Mass.
	Rumford Television Service, Inc.	Rumford, Maine
	United TV Co. of New Hampshire, Inc.	Manchester, New Hampshire
	Westerly Cable Television, Inc.	Westerly, Rhode Island
New York Telephone Co.	Beacon Cable Corporation	Fishkill Township, N.Y. Fishkill Village, N.Y. Beacon, (city) N.Y.
	Broadway Maintenance CATV Corp.	Selden, N.Y. Centereach, N.Y. Medford, N. Y.
	Champlain Cable Corporation	Ticonderoga, N.Y.
	Courier Cable Corp.	Buffalo, N.Y.
	Hightower of Newburgh	Newburgh, N.Y. (city and town), and New Windsor (village and town), N.Y.
	New Platz Tele Cable	New Platz, N.Y.

Bell Operating Co.	*CATV Operator*	*Communities Served*
Ohio Bell	Buckeye Cablevision, Inc.	Toledo, Ohio
	Imperial Broadcasting Corp.	Louisville, Ohio & Canton, Ohio
	Ironton Metropolitan Housing	Ironton, Ohio (Metropolitan Housing Authority Bldgs.)
	Telerama, Inc.	Shaker Heights, Warrensville Heights, and Warrensville Township, Ohio
	Valley Antenna Systems, Inc.	Piqua, Ohio
Pacific Telephone Co.	Omni-Video, Inc.	Mission Valley, Calif. (Section of San Diego).
	Warner Bros. TV Services	Mission Viejo, Calif.
Southern Bell	Cablevision, Inc.	Gastonia, N. Car.
	Rentavision of Brunswick, Inc.	Brunswick, Ga.
Southwestern Bell	Bella Vista Village, Inc.	Bella Vista, Ark.
	See TV Company	Mexico, Missouri
	Southwest CATV, Inc.	McAllen, Texas

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	14

CITATIONS

Cases:

Amendment of the Rules and Regulations Relative to Community Antenna Television Systems, 15 F.C.C. 2d 417	13
Associated Bell System Companies, 5 F.C.C. 2d 357	9
California Interstate Telephone Co. v. Federal Communications Commission, 328 F. 2d 556	7
California Water & Telephone Co., 5 F.C.C. 2d 229	4
California Water & Telephone Co., 6 F.C.C. 2d 440	4
California Water & Telephone Co., 7 F.C.C. 2d 571	4
Capitol City Telephone Co., 3 F.C.C. 189	10
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134	8
Common Carrier Tariffs for CATV Systems, 4 F.C.C. 2d 257	4, 9
General Telephone System, 6 F.C.C. 2d 434	4, 9
Idaho Microwave, Inc. v. *Federal Communications Commission*, 352 F. 2d 729	7
National Broadcasting Co. v. *United States*, 319 U.S. 190	8

363-119—69——1

Cases—Continued

	Page
National Community Television Ass'n, 6 F.C.C. 2d 860	13
Pacific Telatronics, Inc., 37 F.C.C. 1163	10
Pennsylvania R.R. Co. v. *Public Utilities Commission*, 298 U.S. 170	7
Permian Basin Area Rate Cases, 390 U.S. 747	11
Southwestern Bell Telephone Co., 6 F.C.C. 529	9
TeleCable Corp., 17 F.C.C. 2d 517	14
Udall v. *Tallman*, 380 U.S. 1	11
United States v. *Southwestern Cable Co.*, 392 U.S. 157	5, 6, 7, 8
Ward v. *Northern Ohio Telephone Co.*, 300 F. 2d 816, certiorari denied, 371 U.S. 820	10

Statutes:

Communications Act of 1934, as amended, 47 U.S.C. 151 *et seq*	2
Section 2(b)(1), 47 U.S.C. 152(b)(1)	6
Section 3(r), 47 U.S.C. 153(r)	12
Section 202(b), 47 U.S.C. 202(b)	10
Section 214, 47 U.S.C. 214	4, 5, 8, 13
Section 214(a)(1) 47 U.S.C. 214(a)(1)	11
Section 214(a)(2) 47 U.S.C. 214(a)(2)	11
Section 221(b), 47 U.S.C. 221(b)	12

Miscellaneous:

Manatee Cablevision, Inc., 34 Fed. Reg. 12919 (August 8, 1969)	14
Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcast Industry* (1965)	13

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 357

GENERAL TELEPHONE COMPANY OF CALIFORNIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 450

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A27)[1] is not yet reported. The opinion of the

[1] All appendix references herein are to that filed by petitioners in No. 357.

Federal Communications Commission (Pet. App. A30–A77) is reported at 13 F.C.C. 2d 448.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1969 (Pet. App. A27–A29). The petition for a writ of certiorari in No. 357 was filed on July 18, 1969. Petitioner in No. 450 was granted an extension of time within which to seek certiorari by Mr. Justice White, to and including August 8, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether construction by a common carrier of lines which distribute the signals of television and FM broadcast stations from the antenna or "head-end" site of a community antenna television system to the homes of the system's subscribers is subject to regulation by the Federal Communications Commission.

STATUTE INVOLVED

Pertinent provisions of the Communications Act of 1934, as amended (47 U.S.C. 151 *et seq.*) are set forth at pp. 2–3 of the petition in No. 357 and pp. 3–6 of the petition in No. 450.

STATEMENT

A community antenna television system (CATV) consists of three basic components: 1) the reception facilities which pick up, by means of high antennae or microwave transmission, signals transmitted by television and FM radio stations; 2) the "headend" apparatus which converts, modifies and modulates the signals

by electronic equipment so that the signals received can be transmitted along a coaxial cable; and 3) the coaxial cable distribution system which carries the converted signals to the households of the CATV subscribers (see Pet. App. A3). This third component, with which the instant cases are concerned, consists in turn of three parts: a) the trunk or "feeder" coaxial cable which begins at the head-end and carries the signal on the first leg of its journey; b) the distribution cable which carries the signal from the "feeder" line to the immediate vicinity of a subscriber; c) and the "drop-line" which carries it from the distribution cable to the terminal block on the subscriber's premises (see Pet. App. A4).

In the early stages of CATV development, distribution facilities were usually constructed by the CATV operator and operated as an integral part of the system. Increasingly, however, common carriers in the communications field have offered to provide distribution facilities for hire, connecting the head-end to terminal boxes in the subscribers' households for a fee paid by the CATV system.[2] These so-called "channel

[2] The record shows that as of March 14, 1967, six of the 33 operating companies of General Telephone and Electronics Corporation had completed or were in the process of completing construction of eight-channel distribution systems for use by CATV companies in ten communities and orders for four more had been accepted. As of March 1, 1967, the Bell Systems companies furnished such service to at least 178 separate communities or political subdivisions. United Utilities, Incorporated, the parent company of the United telephone operating companies, reported channel service operations in 31 communities; in 30 of these communities United Transmission, Incorporated, a wholly owned subsidiary of United Utilities, is

service" offerings are wholly separate and distinct from other communications services offered by the carriers, such as telephone, telegraph, facsimile or teletypewriter, and are not connected with any telephone exchange or toll service facility.

The present proceeding commenced in April 1966 when the Commission directed operating companies of Bell and General to file tariffs covering CATV channel service offerings.[3] In October, investigations were ordered into the lawfulness of the tariffs,[4] and in January 1967 similar inquiries were launched with respect to United's tariffs and other offerings filed by General.[5] These proceedings were expanded to include questions such as the applicability of Section 214 of the Communications Act, and all of them were consolidated.[6]

Subsequently, the Commission severed the question of the applicability of Section 214 for a separate hearing,[7] which resulted in the Decision and Order of

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the sole operator or a major stockholder in the CATV systems. Analysis of data submitted by the carriers shows that General invested $2,195,000 in channel service for just ten communities; United invested $821,609 in channel service for just six communities; Bell invested $1,360,000 in channel service for just four communities. Based upon a cost per mile of the distribution system, the record shows the investment cost of the then extant Bell channel service systems to be $43,240,019. The investment costs of the other systems is proportionate.

[3] See *Common Carrier Tariffs for CATV Systems*, 4 F.C.C. 2d 257.

[4] *California Water & Telephone Co.*, 5 F.C.C. 2d 229; *Associated Bell System Companies*, 5 F.C.C. 2d 357.

[5] *General Telephone System*, 6 F.C.C. 2d 434.

[6] *California Water & Telephone Co.*, 6 F.C.C. 2d 440.

[7] *California Water and Telephone Co.*, 7 F.C.C. 2d 571, 575. This action was taken in response to allegations by General and

June 26, 1968, now under review (Pet. App. A30–A77). Essentially, the Commission found that the CATV channel service furnished by the carriers constituted "a common carrier undertaking" to provide interstate service and that Section 214 certificates of public convenience and necessity were therefore required for construction of the necessary lines.

Upon review, the court of appeals unanimously affirmed the Commission's decision. Relying largely on this Court's opinion in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, the court below rejected the contention of the carriers that the service they render is intrastate in nature. "The stream of communication is essentially uninterrupted and properly indivisible," the court observed, and since the carriers, "by choice, inserted themselves as links in this indivisible stream [they] have become an integral part of interstate broadcast transmission" even though their physical facilities are located within a single State (Pet. App. A19, A20). Accordingly, the court agreed that the facilities involved formed part of an interstate "channel of communication" within the meaning of Section 214. Likewise, it upheld the determination that the exemption in Section 214 for local, branch and terminal lines was not intended to apply to new construction providing new customers with an entirely new kind of service. Finally, the court summarily rejected the contention that the

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California that insofar as the proceedings dealt with Section 214 matters, they were adjudicatory in nature and required the more formal procedures followed in making adjudicatory determinations.

facilities are entitled to the exemption provided for lines involved in telephone exchange service (Pet. App. A20).

ARGUMENT

Petitioners' chief contention is that the Commission's decision, upheld by the court below, exceeds its jurisdiction over interstate communications and improperly infringes on the authority of the States to regulate common carrier facilities and services which do not cross State boundaries (Pet. 9).[8] This argument raises no significant issue that was not considered by this Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, and does not warrant plenary review. Similarly, there is no substance to the claims that particular language of Section 214 exempts the services in question from the requirement of certification.[9]

1. In upholding the Commission's view that CATV channel service provided by common carriers is interstate in character, the court of appeals followed this Court's statement in *United States* v. *Southwestern Cable Co., supra,* 392 U.S. at 168–169:

> Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates. We may

[8] Section 2(b)(1) of the Act (47 U.S.C. 152(b)(1)) excludes "intrastate communication service" from Commission jurisdiction.

[9] Petitioners in Nos. 357 and 450 raise substantially the same points. All references herein are to the petition in No. 357 unless otherwise specifically noted.

> take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that "is not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 279. [Footnote omitted.]

See also *Idaho Microwave, Inc.* v. *Federal Communications Commission,* 352 F. 2d 729 (C.A.D.C.); *California Interstate Tel. Co.* v. *Federal Communications Commission,* 328 F. 2d 556 (C.A.D.C.). The carriers here perform some of the same functions as the CATV systems in *Southwestern Cable* and, as the court below concluded, their activities similarly form a part of this "stream of communication." The opinion below properly concluded that (Pet. App. A19):

> Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority; fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication.[10] * * *

[10] *Pennsylvania R.R. Co.* v. *Public Utilities Commission*, 298 U.S. 170, on which petitioners rely (Pet. 13), is plainly

See *United States* v. *Southwestern Cable Co., supra,* 392 U.S. at 172–173; *National Broadcasting Co.* v. *United States,* 319 U.S. 190; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134.

Contrary to the petitioners' assertions, the certification requirement upheld below appears to have no impact whatever upon existing State regulatory programs. While many States do have statutory counterparts of Section 214 applicable to construction of facilities to be used solely for intrastate service, the record in the proceedings before the Commission does not show a single instance in which a carrier has applied for or been required to obtain a certificate of convenience and necessity from a State regulatory body before constructing facilities to provide channel service to CATV systems. Nor is the decision below, as the carriers suggest, a departure from established regulatory patterns. Under Section 214 carriers

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distinguishable. There, after mining and moving coal by its own barge line between two points within Pennsylvania, a coal company transferred the cargo to cars on its own railroad line which traveled along its private right-of-way, ultimately reaching the coal company's plant in Negley, Ohio. There the coal was processed and loaded aboard a common carrier railroad line for delivery to Youngstown, Ohio. This Court held (298 U.S. at 175) that the common carrier was rendering an intrastate service, deciding that the interstate transportation by the coal company could not be "tacked to the intrastate transportation" by the carrier so as to bring its service under the jurisdiction of the Interstate Commerce Commission. But here, as the authorities discussed above make clear, the broadcast signal is in continuous interstate communication and is subject to the Commission's regulatory power from its inception. *United States* v. *Southwestern Cable Co., supra,* 392 U.S. at 169.

have for many years been required to obtain certificates of convenience and necessity from the Commission for the construction of new lines within a single State for use in the transmission of interstate communications. See *Southwestern Bell Telephone Co.*, 6 F.C.C. 529, 532, decided in 1938. The instant case simply holds that this well-established jurisdiction of the Commission extends to cable lines used to distribute television signals as well as the more traditional kinds of communication. There is no indication that in the past this regulatory pattern has worked to "nullify conditions locally imposed" (Pet. 9), such as zoning and similar controls, and there is no reason to anticipate that it will do so in the future.

Petitioners argue (Pet. 10) that, although the decision below relates only to the construction of lines, it "also necessarily extends the Commission's jurisdiction to rates and to other aspects of common carrier service, again at the expense of State and local regulatory authority." The short answer is that neither the Commission's decision nor the opinion below deals directly with the regulations of charges, practices or services—matters which are presently pending before the Commission in proceedings that will in due course be open to judicial review.[11] Thus,

[11] In 1966 the Commission directed the carriers to file tariffs with respect to the channel service offerings. The carriers petitioned unsuccessfully for reconsideration, *Common Carrier Tariffs for CATV Systems*, 4 F.C.C. 2d 257, but did not seek judicial review at that time. Instead, the tariffs were filed and an investigation into their lawfulness begun. See the *Associated Bell Systems Companies*, 5 F.C.C. 2d 357, and *General Telephone System*, 6 F.C.C. 2d 434.

the raising of these questions now is premature. In any event, petitioners' contentions in this regard are without merit.

That Congress intended the Commission rather than the States to regulate charges and services involving common carriers' distribution of broadcast signals seems beyond dispute. Section 202(b) of the Act (47 U.S.C. 202(b)) provides that charges or services, stemming from "the use of common carrier lines of communication * * * in chain broadcasting or incidental to radio communication of any kind," fall under the jurisdiction of the Commission. In *Ward* v. *Northern Ohio Telephone Co.*, 300 F.2d 816, 819 (C.A. 6), certiorari denied, 371 U.S. 820, the court held that "[w]here lines * * * are furnished for broadcast purposes to a radio station by a telephone company, the telephone company is engaged in interstate communication, and is in interstate commerce, subject to federal law, even where all the property of the company is located within a single state." See also *Pacific Telatronics, Inc.*, 37 F.C.C. 1163; *Capitol City Telephone Co.*, 3 F.C.C. 189. The service rendered by the carriers here is plainly "incidental to radio communication," doing for the ultimate receiver of the communication essentially what the carrier in *Ward* did for the originator. In *Ward* the link was between the studio and the transmitter; here it is between the receiving antenna and the subscriber's premises, but there is nothing in this factor that would raise any novel question of Commission jurisdiction.

2. Petitioners' contentions that the construction of lines for CATV channel service falls within one or

more of several exemptions enumerated in Section 214 present no questions of substance. The court below gave appropriate deference to the agency's construction of its statute (see *Udall* v. *Tallman,* 380 U.S. 1), and to its conclusion that certification by the Commission would further basic statutory objectives (*Permian Basin Area Rate Cases,* 390 U.S. 747). Its determination that construction of the facilities in question is not exempt from the requirement of certification is clearly correct.

Section 214(a)(1) provides that no certificate shall be required for the construction, acquisition, or operation of a line within a single state "unless such line constitutes part of an interstate line." The term "line" is defined as "any channel of communication," and accordingly the court below could find a reasonable basis for the agency's holding that petitioners, being "an integral component in the indivisible dissemination system which forms an interstate channel of communication from the broadcaster to the viewer," are "part of an interstate line" and therefore not entitled to the 214(a)(1) exemption (Pet. App. A21).

Similarly, the court and the Commission properly concluded that the Section 214(a)(2) exemption for "local, branch, or terminal lines not exceeding ten miles in length" was limited to minor improvements or extensions of existing carrier facilities, with the purpose of obviating a continuous stream of burdensome applications for Commission approval. "It is reasonable to assume that Congress was not troubled by the prospect of a local telephone company running an extension line to a cluster of houses in a new sub-

division near existing facilities," but "[i]t is quite another matter to suggest that it meant to exempt a carrier's efforts to install an entire network consisting of 'trunk,' 'distribution,' and 'dropline' cables to provide TV service via CATV to an area that has theretofore been without such broadcast distribution facilities" (Pet. App. A24).

Finally, petitioner in No. 450 presses an exemption claim based on the exclusion in Section 221(b) of facilities "for or in connection with * * * telephone exchange service" (Pet. No. 450, 31–38). The court below properly agreed with the Commission's summary rejection of this contention as "inconsistent with the plain meaning of the words used" (Pet. App. A20–A21). Section 3(r) of the Act (47 U.S.C. 153(r)) defines *telephone exchange service* as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." Clearly, CATV channel distribution service does not contemplate the furnishing to subscribers of "intercommunicating service" of the type usually identified with a telephone exchange.

3. Admittedly, Commission regulation of the type in question does not extend to CATV operators who construct their own facilities for reception and distribution or those who run their distribution cable over existing poles of utility systems pursuant to private contracts, since neither of these types of operation involves common carriage. Petitioners contend

(Pet. 11) that the decision below gives such CATV operators, who require no prior Commission approval to construct and operate their distribution facilities, an unfair competitive advantage over those operators who rely upon common carriers for distribution service because it will allow them to delay construction by competing systems by filing objections to the issuance of Section 214 certificates.

This claim is unrealistic, since competition among CATV systems for customers is quite uncommon. The Commission has found that CATV service has tended to develop on a "noncompetitive, monopolistic basis"; it is indeed for this reason that a combination of local, State and federal regulation has been and in all likelihood will continue to be required. *Amendment of the Rules and Regulations Relative to Community Antenna Television Systems,* 15 F.C.C. 2d 417, 425; see also Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcast Industry,* p. 45 (1965). In any event, the Commission plainly has the power to protect its processes from being abused through the filing of dilatory claims.

In actuality, the Commission's certification procedure is far more likely to discourage than to give rise to unfair practices. One of the considerations that gave impetus to the Commission's assertion of Section 214 jurisdiction was the claim of CATV systems that the carriers have used their control of existing poles and conduits unfairly to the advantage of their corporate affiliates holding or seeking to obtain CATV franchises. See *National Community Television Ass'n,*

6 F.C.C. 2d 860. In several cases in which requests for certificates of convenience and necessity have been set for hearing, the Commission is inquiring into charges that the actions of the carriers *vis-à-vis* the CATV systems "are anti-competitive and monopolistic in nature, in contravention of the Communications Act or otherwise contrary to the public interest." *Manatee Cablevision, Inc.*, 34 Fed. Reg. 12919, 12921 (August 8, 1969); *TeleCable Corp.*, 17 F.C.C. 2d 517. The Commission's decision provides an administrative forum, heretofore lacking, where such claims can be heard and resolved.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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No. 357

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GENERAL TELEPHONE COMPANY OF CALIFORNIA, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, NATIONAL CABLE TELEVISION ASSOCIATION, INC., ET AL., *Respondents.*

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REPLY BRIEF FOR PETITIONERS

The Government relies heavily upon the statement in the opinion below that a denial of the Commission's jurisdiction over the common carrier facilities at issue here "would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority; fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication." (Gov. Br. 7).

This argument that common carrier services provided to CATV operators must be federally regulated

because of the need for centralized regulation of CATV itself ignores the fact that Congress deliberately chose to assign to the States a primary role for regulating services provided by communications common carriers.* (Petr. Br. 14-15). It is for this reason that the telephone system— a far more "unified system of communication" than CATV—consists of facilities which are for the most part subject to state and local, not federal regulation. (Petr. Br. 15 n. 10).

The Government's argument for total federal preemption of regulatory authority over all aspects of CATV is also inconsistent with a decision of a three-judge district court that is now before this Court on direct appeal. *TV PIX, Inc.* v. *Taylor,* No. 214, Oct. Term, 1969. In both the proceedings below and in the Jurisdictional Statement in this Court the appellants in *TV Pix* basically argued that the Federal Communications Commission's jurisdiction over the regulation of television and CATV is so broad that it preempts Nevada's regulation of CATV operators' rates and franchises. The lower court in *TV Pix* rejected that contention, holding that the FCC has only limited jurisdiction to regulate some CATV operations (*e.g.,* importing distant television broadcast signals, see *United States* v. *Southwestern Cable Co.,* 392 U.S. 157) and that this jurisdiction does not foreclose state regulation of other aspects of the CATV industry. The holding of *TV Pix* is consistent with one of the major points that the carriers have made in this case (Petr.

* Contrary to the Government's assertion that the common carrier service at issue here is "wholly separate and distinct from other communications services offered by the carriers" (Gov. Br. 4), CATV channel service is, in fact, provided by facilities that are similar to and in some instances identical with facilities used to provide other similar forms of telephone service. (Petr. Br. 4).

Br. 4, 8-11) and was relied upon in their petition and in their brief to the court of appeals. (Petr. Br. 11).

If this Court notes probable jurisdiction in *TV Pix* and sets that case for oral argument, it is respectfully suggested that the Court should grant certiorari in this case so as to have before it a broader range of issues concerning federal preemption of state regulatory authority over matters affecting the CATV industry. Conversely, an affirmance of *TV Pix* would constitute a rejection by this Court of the arguments for centralized regulation of CATV and would be inconsistent with the rationale of the court of appeals in this case that common carrier service to CATV operators must be federally regulated because of that service's relationship to CATV operations.

CONCLUSION

The writ should be granted for the reasons stated in the petition and in this reply brief.

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